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Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-6257

TROY LEON GREGG,
Petitioner,

v.

GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
Constitutional and Statutory Provisions Involved	3, App. A
Constitutional Provisions . .	3
Statutory Provisions.	App. A
1. Statutory Provisions, Ga. Laws 1973, p. 159 . .	1a
2. Capital Crimes	16a
a. Current Capital Crimes	16a
b. Perjury	20c
3. Prosecutorial and Grand Jury Discretion.	20a
4. Oaths	25a
5. Execution	28c
6. Clemency	35a
STATEMENT OF THE CASE	4

Page

SUMMARY OF ARGUMENT. 18

I. Meaningful Discretion Characterizes the Georgia Death Penalty Provisions. . . 20

A. Introduction. 20

B. Death Sentence Discretion Is Confined By Aggravating Circumstance Criteria to Only the Most Abhorrent Crimes 22

C. Structuring of Discretion Continues at the Appellate Level 41

II. Executive Discretion. 57

A. The Prosecutor 57

B. Executive Clemency . . . 63

III. The Death Penalty Is Not Per Se Cruel and Unusual Punishment Condemned by the Eighth or Fourteenth Amendments to the United States Constitution. 66

A. The Standard of Review. . 66

B. The Legislature in Enacting a Death Penalty Statute Determined that Such a Penalty Was Not Excessive and is Justified Under Certain Conditions. . 71

Page

C. The Georgia Jury's Imposition of the Death Penalty Is In a Non-Arbitrary and Non-Capricious Manner . . 86

CONCLUSION 93

APPENDIX

A. Statutory Provisions. . . 1a

B. Trial Judge's Report . . 1b

C. Homicide Totals 1c

TABLE OF AUTHORITIES

Anderson v. State, No. 28527, (Ga. S.Ct. Appeal dismissed as premature, Apr. 8, 1974) . . 24

Atkins v. State, 231 Ga. 441, 202 S.E.2d 62 (1973) 24,44

Bailey v. State, 153 Ga. 413, 112 S.E. 453 (1922). 54

Banks v. State, 235 Ga. 121 (1975).24,44

Barrow v. State, 235 Ga. 635(1975).24,44

Berryhill v. State, 235 Ga. 549 (1975) 23,32,52

Brown v. State, 235 Ga. 644(1975). 24,27,44

Caldwell v. Paige, 230 Ga. 456; 197 S.E.2d 692 (1973). 61

Page

Cargile v. State, 194 Ga. 20;
20 S.E.2d 416 (1942) 60

Chenault v. State, 235 Ga. 216;
215 S.E.2d 233 (1975). 23,34

Coker v. State, 234 Ga. 555,
216 S.E.2d 782 (1975) 23,33,50

Coley v. State, 231 Ga. 829;
204 S.E.2d 612 (1974). 21,24,33,
41,50,51

Dobbs v. State, No. 30453,
(Ga. S.Ct., Feb. 24, 1976) . . . 23,32,38,52

Eberheart v. Georgia, 47 Ga. 598
(1873) 23,50,76

Eberheart v. State, 232 Ga. 247,
206 S.E.2d 12 (1974) 26

Echols v. State, 231 Ga. 633,
203 S.E.2d 165 (1974). 33

Furman v. Georgia, 408 U.S. 238
(1972) 70,71,75,78,
79,80,84,86,
87

Floyd v. State, 233 Ga. 280,
210 S.E.2d 810 (1974) 23,24,32,
36,37,52

Goodwin v. State, No. 30587,
(Ga. S.Ct., Feb. 24, 1976) . . . 23,32,51,52

Page

Gregg v. State, 233 Ga. 117,
210 S.E.2d 659 (1974). 23,24,32,55

Hooks v. State, 233 Ga. 149,
210 S.E.2d 668 (1974). 23,26,30,50

House v. State, 232 Ga. 140,
205 S.E.2d 217 (1974). 23,32,52

Jarrell v. State, 234 Ga. 440,
216 S.E.2d 258 (1975). 23,24,32,35,
44,49,52

Jordan v. State, 233 Ga. 929,
214 S.E.2d 365 (1975) 22

Kemmler, 136 U.S. 436 (1890) . . . 78

Kimball v. State, 63 Ga. App. 183;
10 S.E.2d 240 (1940) 54

Louisiana ex rel. Francis v.
Resweber, 329 U.S. 459 (1947). . 78

McCorquodale v. State, 233 Ga. 369,
211 S.E.2d 577 (1974). 23,23,38

McGautha v. California,
402 U.S. 183 (1971) 45,68,78,
86,87,88

Mason v. State, No. 30338,
(Ga. S.Ct., Jan. 7, 1976). . . . 23,30,33

Miller v. State, 224 Ga. 627,
163 S.E.2d 730 (1968) 50

Mitchell v. State, 234 Ga. 160,
214 S.E.2d 900 (1975) 23,26,32,37,
38,41,52

Page

Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1974) 23,26,32, 50,51,52

Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1974). 24,44,46

Paige v. Potts, 354 F.2d 212 (5th Cir. 1965) 61

Paige v. State, 219 Ga. 569; 134 S.E.2d 793 (1964). 61

Powell v. Texas, 392 U.S. 514 (1968) 72

Prevatte v. State, 233 Ga. 929; 214 S.E.2d 365 (1975) 22,24,32, 44,47

Pulliam v. State, No. 30594, (Ga. S.Ct., Feb. 24, 1976) . . . 23,32

Reid v. Covert, 352 U.S. 1 (1957). 89

Reynolds v. State, 132 Ga. App. 89; 207 S.E.2d 630 (1974) 60

Ross v. State, 233 Ga. 361; 211 S.E.2d 356 (1974) 23,32,50

Smith v. State, Nos. 30205 and 30268 (Ga. S.Ct. Jan. 6, 1976) . 22,23,40, 49,51

Snyder v. Mass., 291 U.S. 97 (1934) 92

Page

Stack v. State, 234 Ga. 19, 214 S.E.2d 514 (1975) 24,43,44

State v. Shiren, 9 N.J. 445; 88 A.2d 601 (1952) 59

Swain v. State, 91 Ga.App. 561; 86 S.E.2d 642 (1954) 38

Tamplin v. State, 235 Ga. 20; 235 Ga. 774 (on rehearing) (1975) 24,32,51

Trop v. Dulles, 356 U.S. 86 (1958) 67,68,72,78

Turner v. State, 235 Ga. 826, ___ S.E.2d ___ (1976) 27

United States v. Crockett, 506 F.2d 759 (5th Cir. 1975) . . 35

Weems v. United States, 217 U.S. 349 (1910) 66,69,72,78

Williams v. New York, 337 U.S. 241 (1949). 79

Witherspoon v. Illinois, 391 U.S. 510 (1968) 45,86

Page

STATUTES

United States Constitution, Eighth Amendment 3

United States Constitution Fourteenth Amendment 3

Ga. Code Ann. § 2-3011 64,65

Ga. Code Ann. § 2-2902 58

Ga. Code Ann. § 2-2908 58

Ga. Code Ann. § 2-2915 58

Ga. Code Ann. § 26-1101 22

Ga. Code Ann. § 26-1301 39

Ga. Code Ann. § 26-1305 38

Ga. Code Ann. § 26-1311 22

Ga. Code Ann. § 26-1901 22,74

Ga. Code Ann. § 26-1902 74

Ga. Code Ann. § 26-2001 22,39

Ga. Code Ann. § 26-2201 22

Ga. Code Ann. § 26-2401 22

Ga. Code Ann. § 26-3102 27,30

Page

Ga. Code Ann. § 27-1801 58

Ga. Code Ann. § 27-2401 42

Ga. Code Ann. § 27-2503 25,26,47

Ga. Code Ann. § 27-2514 30

Ga. Code Ann. § 27-2528 25

Ga. Code Ann. § 27-2534 25

Ga. Code Ann. § 27-2534.1 . . . . 27,28-29,31, 34,35,38,39, 40,52

Ga. Code Ann. § 27-2537 . . . . . 30,34,37,41, 42,43,44,48, 49,52,53

Ga. Code Ann. § 70-301 42

Ga. Code Ann. § 77-511 64

REGULATIONS

Code of Professional Responsibility EC 7-13 58

Code of Professional Responsibility DR 7-103 58

Page

OTHER AUTHORITIES

Black, Capital Punishment: The Inevitiability of Caprice and Mistake (1974). . . . 38

Cahn, The Sense of Injustice: An Anthropomorphic View of the Law (1949) 83

Jerusalem Post, July 9, 1974 . . 74

Leiser, Liberty, Justice and Morals, (1973) 74,80,83

Murphy, Kant: The Philosophy of Right (1970) 81

Report on Royal Commission on Capital Punishment (1949-1953) 75,88

Tocqueville, Democracy in America 89

Trial (March, 1976). 81

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The decision of the Supreme Court of Georgia is reported at Gregg v. State, 233 Ga. 117, 210 S.E.2d 169 (1974).

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on October 17, 1974. Motions for rehearing by the State and by the defendant were denied on October 29, 1974. On January 27, 1975, petitioner requested an extension of time for petitioning for a writ of certiorari, and on February 5, 1975, Mr. Justice Powell ordered that the time for filing the petition be extended through March 28, 1975. The petition was filed on March 27, 1975, and was granted on January 22, 1976. Jurisdiction obtains under 28 U.S.C. § 1257(3) (1970).

QUESTION PRESENTED

Would petitioner's execution for the witness-elimination murder and robbery of two men be a cruel and unusual punishment, violative of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, when petitioner's death sentence has been imposed, and would be carried out, under a revised, Georgia procedure, enacted to insure that capital punishment shall not be administered in an arbitrary or capricious manner?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

This case involves the Eighth Amendment:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

This case also involves the Fourteenth Amendment:

> ". . .[N]or shall any State deprive any person of life, liberty, or property without due process of law. . . ."

The statutory provisions involved are set forth as Appendix A to this Brief [hereinafter cited as "App. A at _____").

STATEMENT OF THE CASE

The jury sentenced Troy Leon Gregg to death for killing Fred Simmons and Robert Moore, working men, who were giving him a ride from Florida when he shot and robbed them on Thanksgiving eve, 1973, near Atlanta. (R. 3, 14, 15, 19 [indictment and sentences of death for murder and armed robbery]; T. 122, 287-88, 311).

The bodies were found Thanksgiving morning, November 22, in a drainage ditch by the Lawrenceville Highway exit, on Interstate 85, the main road northeast from Atlanta. (T. 221). When the chief investigating officer, Gwinnett County Detective Bert Blannot, arrived at the scene about 7:45 a.m., other officers already had secured the area. (T. 221, 231-32). Police looked unsuccessfully for weapons. (T. 238). On Simmons, they found personal papers from which his wife was contacted. (T. 223, 233). Moore's body did not have any identification, but police did find a gas station receipt on him, which listed a Florida car tag number. (T. 230, 232, 236; State's Exhibit 24). From the number police obtained a tentative description of the car as a 1960 Pontiac, maroon on white. (T. 230, 234).

Dr. Bryan Dawson of the Georgia State Crime Laboratory arrived about 11:00 a.m. to examine the bodies. (T. 87). He made a brief examination at the scene and then had the bodies removed for autopsies that afternoon. (T. 89). After the autopsies,

Dr. Dawson concluded that Moore died from a bullet wound in the back of his head, and Simmons died from a bullet wound in the temple. The men probably had died ten to fifteen hours before Dr. Dawson first saw them at 11:00 a.m. (T. 87-96).

Moore was of average build; Simmons was a small man. (T. 110). From blood alcohol tests, it was probable that each man was heavily intoxicated when he died. (T. 93, 97, 100-01). Dr. Dawson specifically looked for signs that either man was in an altercation. The evidence was mixed, but Dr. Dawson concluded that the most significant evidence -- facial abrasions -- had occurred just after death and were probably sustained from a fall into (the) drainage ditch." (T. 97-98, 101-07, 110, 112). The facial abrasions ran up and down the face, as if the body had been dragged or pushed, and an open cut on the face of Simmons did not have bleeding underneath the skin or powder tattooing from the pistol shot. The absence of bleeding indicated loss of blood pressure and the absence of powder tattooing when it was present in the bullet wound near the abrasion, indicated that the bullet wound occurred first. (T. 97-98, 104).

The morning after Thanksgiving, Gwinnett County police received a telephone call from Dennis Weaver, 22, of Springfield, Missouri. (T. 131, 228). He called after he had read about the killings in the Friday morning newspapers in Atlanta and recognized Simmons and Moore as the two men, who had given him a ride to Atlanta from north Florida two days before. (T. 131-32).

Police interviewed Weaver, and he added to the clue they had that they were seeking a 1961 maroon on white Pontiac. He also told police about two other hitchhikers, who already were in the car when Simmons and Moore stopped for Weaver. (T. 117-18, 133-35, 228-30, 234). The other passengers were "Troy", (i.e., petitioner, Troy Leon Gregg), and "Sam", (petitioner's side-kick Floyd Raiford Allen, III). (T. 117-18). Weaver described the suspects in detail and drew a picture of petitioner, the man he knew as "Troy". (T. 134-35, 155-56, 162-64; State's Exhibit 19).

All four men were in the car when Weaver got out in Atlanta about 11:00 p.m., not far from the death scene and within the time period established by Dr. Dawson for the time of death. (T. 130, 231). Weaver told police the other four men had discussed going to Asheville, North Carolina, so a detailed description of the car and the two suspects was teletyped to that city. (T. 121-22, 127, 134, 163-64, 238-39).

On the afternoon of November 23, Asheville police spotted petitioner and Sam Allen as they were riding around in the victims' car as described. (T. 161, 164). Petitioner had a pistol protruding from his hip pocket, which ballistics tests proved to be the murder weapon. (T. 76-78, 84, 165-66).

He also was carrying $107 in cash. (T. 166). Inside the glove compartment of the stolen Pontiac was a bill of sale made out to "Fred E. Simmons" by a dealer in Winter Garden, Florida. (T. 168-69; State's Exhibit 22). Also in the car were some old clothes and boots. Petitioner himself was wearing new boots. (T. 172). He told police that he and Sam had spent the night at a motel, and there police found a new stereo for an automobile. (T. 173). Sam had a cut lip. (T. 177).

Police gave petitioner a Miranda warning and told him that he was a murder suspect for the Georgia slayings. (T. 165, 170-71, 179-80, 262). Within fifteen minutes, while processing in at the station, petitioner signed a standard rights waiver. (T. 165, 170-71, 262, State's Exhibit No. 25).

Asheville police questioned petitioner about an armed robbery there, but they did not question petitioner about the Georgia crime. (T. 180-81, 190). Instead, they notified the Gwinnett County Police Department in Lawrenceville, Georgia, of the arrest and of the suspects' names. Gwinnett County detectives immediately secured arrest warrants for Sam Allen and petitioner and drove to Asheville. (T. 191, 204, 239-240). They first say petitioner at a magistrate's office about 9:30 that night, when he waived extradition. (T. 182, 241-42). He also agreed then to talk with Detective Blannot saying he understood his rights. (T. 243, 253, 281). Blannot told petitioner that petitioner was under arrest for Simmons' murder. (T. 295, 321).

After at first denying he knew anyone named Fred, petitioner gave Blannot a statement in Asheville, which was reduced to writing and signed. (T. 242-43, 248-49, 250-54, 281-83, 295, 300; State's Exhibit 26). In the statement petitioner admits shooting Moore and Simmons and admits that he and Sam Allen left with the car and about $400 to $500 in money belonging to Moore and Simmons. However, petitioner justified the slaying as self-defense. According to him, Moore and Simmons had picked up himself and Allen in Florida and tried to put them out in Atlanta without their personal belongings. A fight occurred and petitioner had to shoot Simmons and Moore who were attacking him and Sam with a pipe and knife. (T. 282-83; State's Exhibit 26).

After Sam Allen's interview ended, he and petitioner were driven back to Georgia in separate cars. (T. 284-86). The trip to Lawrenceville began about 12:30 or 1:00 a.m. and lasted about four hours. (T. 181, 250-51, 255, 283-84, 322-23). The group in petitioner's car conducted only a general conversation and did not discuss the slayings. Petitioner was loosely handcuffed and was freed during stops for doughnuts and coffee. At times he dozed. (T. 256-57, 284-85, 290-91, 322, 348-49). There were two exits to Lawrenceville off I-85. The officers

drove to the second exit, in part because it was the crime scene and they wanted to establish in their own minds what had taken place. (T. 276, 289-90). Both groups stopped there, and Sam Allen gave the following account of the shooting in front of Petitioner:

"Sam told us that he had been sitting in the back seat of the 1960 Pontiac and was about half asleep that he woke up when the car stopped. That the two victims got out, Fred and Tex, got out, and Sam told us as soon as they got out, Troy turned around and told him, he said, get out, we're going to rob them. Sam told us that he got out and walked toward the back of the car and looked around and could see Troy at the car, with a gun in his hand, laying up on the car, so he could get a good aim, the two men had gone down the bank and had relieved themselves and as they were coming up the bank, according to Say, Troy fired three shots, one of the men fell, the other staggered, Troy then circled back around the back, or rear of the car and approached the two men, both of which were now laying in the ditch. He placed the gun to ones head and pulled the trigger then went quickly to the other one and placed the gun to his head and pulled the trigger again, he then took the money, whatever contents were in their pockets, he told Sam, to get in the car and they drove away." (T. 287). (Sic).

At this point, according to the trial testimony of Detective Blannot:

> "Chief Crunkleton asked Troy if that was how it happened and Troy replied, after hanging his head and looking at the ground, 'Yes, it was'. . . . Chief Crunkleton then asked him these words, I quote, 'You mean you shot these men down in cold-blooded murder just to rob them . . . and Troy replied, yes and Chief asked him why, and he said he didn't know." (T. 287-88).

Petitioner and Allen were taken from the crime scene to the police station, where Blannot reduced the new oral account to writing and presented it to Petitioner. This time Petitioner refused to sign. (T. 288, 293, 324).

In follow-up investigation, police found Trooper D. J. Cobb, a Florida highway patrolman. He had come upon Simmons and Moore after their Ford broke down in Florida and took them to buy a 1960 Pontiac on the day before Thanksgiving. He was able to identify two other passengers as petitioner and Allen. (T. 206-12).

The Monday after the arrest, November 27, 1973, attorneys Jim Henderson and Stan Sunderland were appointed to represent petitioner and Sam Allen. (Trial Judge's Report, last page; App. B, p. 86). They represented petitioner at a commitment hearing on the 27th. On December 17, the grand jury indicted petitioner for the murders and armed robberies of both Simmons and Moore, under Ga. Code §§ 26-1101 and § 26-1902. (R. 3-6). On December 21, the trial court appointed petitioner's present counsel to represent him because of possible conflict of interests between petitioner and Allen. (Trial Judge's report, App. B, p. 86; R. 8; T. 188). On December 31, the District Attorney served petitioner's attorney with a notice of statutory aggravating circumstances, which the district attorney expected to prove in order to seek the death penalty, and also made his investigative file available. (R. 6-9; T. 188).

The trial court then granted a motion by petitioner to continue the case from the January to the February calendar. (R. 8-9; Trial Judge's Report, App. B, p. 6b).

The trial lasted from February 4 to February 7. Four panels and a partial fifth panel were put upon Petitioner. (T. 1, 17, 30, 39, 49). Three jurors were struck for cause because they could not vote to impose a death penalty under

any circumstance. (T. 2-4, 31). No other jurors expressed scruples against the death penalty. The State exercised eight of its ten strikes, the defendant the maximum, 20. (T. 56-60).

The State's case-in-chief consisted essentially of proving the investigation, admissions, and confession described above. Petitioner's case-in-chief consisted of his own testimony. [Neither side called Sam Allen. He appeared only to be identified by weaver.] Petitioner's testimony substantially tracked what he told Detective Blannot in Asheville. (T. 282-83, 308-25). The State attacked the testimony in several ways and also relied on the admissions petitioner was willing to make.

Although he said he was defending himself and Sam Allen and denied meaning to kill Simmons and Moore, petitioner continued to admit shooting them. (T. 324). He also admitted that Detective Blannot gave an accurate description of the account of the robbery and murder Sam Allen made in his presence back at the crime scene. (T. 349). He disputed Blannot's word that petitioner admitted then that Sam was telling the truth. (T. 350).

Whereas petitioner admitted in Asheville that he and Allen took the car and money, at trial he blamed the theft on Allen, saying he stood by nervously as Sam looted the bodies and drove off only because he was scared. (T. 283, 320-21, 325, 329-30).

On cross-examination, petitioner admitted that he and Simmons left St. Cloud with about $8 to $10 between them. He also admitted seeing Simmons and Moore with money and admitted that it was fair to say that Bob Moore had "a wad" of money. (T. 316, 318, 327-328).

During the trial petitioner explained the fact that Moore was shot twice by saying that his automatic pistol was light on the trigger and it went off twice. (T. 334). Petitioner could not explain why one of Moore's wounds was in the cheek and the other was in the back of the head. (T. 90, 338). Petitioner also admitted that the two victims were drinking heavily and Simmons was drunk and having difficulty keeping his balance. (T. 342).

Petitioner's cross-examination ended with his identification and explanation of a letter he wrote to Sam Allen when both were in jail awaiting trial. (T. 350). The letter is entitled "A statement for you" and instructs Sam to memorize it and burn it. (State's Exhibit 29).

Petitioner said he wrote the account, which was consistent with his own story, at Sam's request. (T. 350, 352). Petitioner denied that he wrote portions of the letter, including the instructions to memorize and burn it. (T. 351-354).

In rebuttal, the State called two witnesses. A Crime Lab handwriting analyst said that petitioner had written the whole letter to Sam, except that she did not reach an opinion on who had written a portion addressed "Sam Allen, No. II". (T. 360-61).

Petitioner's testimony that he had not meant to kill Simmons and Moore was impeached by the testimony of Detective William Gibson of Asheville. Gibson testified that petitioner asked him for a cigarette and in the course of this conversation, Gibson asked petitioner why he shot these people. Petitioner's response was, "By God, I wanted them dead." (T. 379-380).

In his own rebuttal, Petitioner said he did not recall the conversation with Detective Gibson and did not make the statement Detective Gibson attributed to him. (T. 381). At the conclusion of the evidence, the jury was instructed to find petitioner guilty or not guilty of murder. The instructions included a charge on the justifications of self-defense and defense of others. (T. 430-31, 450). On the armed robbery charges, the jury was instructed that if it first determined that petitioner was not guilty of armed robbery, then it could consider whether he was guilty of robbery by intimidation. (T. 439).

The verdict was guilty of murder and armed robbery on all four counts.

During the punishment phase of trial, both sides made argument to the jury without tendering further evidence. (T. 455-473).

In its instruction concerning punishment, the Court told the jury that it was the duty of the jury to determine the penalty for each offense. The authorized punishments for murder were: "death by electrocution, . . . or imprisonment for life." The authorized penalties for armed robbery were death,

imprisonment for life, or a set term within a range of one to twenty years.

The court then told the jury to determine whether there were statutory, aggravating circumstances present beyond reasonable doubt. The court defined these statutory aggravating circumstances and explained that if the jury found them present beyond a reasonable doubt, it "would be authorized to consider imposing the sentence of death." If the jury did not find the presence of statutory aggravating circumstances, it could not consider the death sentence. The court next explained that the statutory instructions would go out with them in written form, along with a form for the verdict. The court then explained:

"In arriving at your determination as to what sentence is appropriate, you are authorized to consider all the evidence received here in court presented by the State and the defendant throughout the trial before you. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation. Mitigating circumstances are those which do not constitute a justification of excuse for the offense in question, but which, in fairness and mercy may be considered as a extinuating or reducing the degree of moral culpability of punishment.

> "Aggravating circumstances are those which increase the guilt or innormity of the offense or add to its injurious consequence." (T. 476). (Sic).

The jury found the presence of statutory aggravating circumstances and imposed the death penalty on each count.

On appeal to the Supreme Court of Georgia, petitioner attacked the constitutionality of the death penalty, and raised several other issues. The Supreme Court held: (1) Although the issue was not argued, the evidence was sufficient. (2) The trial court was correct in not charging voluntary manslaughter because there was no evidence to support a finding of "sudden, violent, and irresistable passion resulting from serious provocation." Ga. Code § 26-1102. (3) For the armed robbery conviction, there was sufficient evidence to show possession of the car in Simmons and the taking of money from Moore. (4) The arrest was made with probable cause under circumstances which justified the absence of a warrant; the Miranda warning was not stale as a matter of law, and the evidence supported the voluntary and knowing nature of the confession. Since the State proved petitioner's own admission, other than Allen's account, there was no confrontation problem. (5). The death penalty was not unconstitutional.

The Supreme Court affirmed the convictions and the death penalties for murder. It vacated the death sentences for armed robbery on two grounds: First, since the armed robbery counts were used

in statutory aggravation of the murder counts, the murder counts could not be bootstrapped into aggravation of the armed robbery. Second, the death sentences for armed robbery were disproportionate under Ga. Code Ann. § 27-2537(c)(3) since Georgia juries rarely impose it for that crime.

SUMMARY OF ARGUMENT

I.

To retain the death penalty, the General Assembly of Georgia enacted Ga. Laws 1973, p. 159. This act greatly narrows the jury's discretion to impose the death penalty, allowing it only for the most outrageous crimes and for crimes which may be thwarted by the threat of the supreme price. In each individual case sentences continue to be tailor-made by those who have participated in the full trial firsthand. This remaining, controlled discretion is further structured by the Supreme Court of Georgia. The 1973 act provides for automatic and swift appellate review to assure, first, that the death penalty will not be carried out unless the evidence supports the finding of one of these especially serious crimes. Second, the sentence is set aside if the death penalty is only rarely imposed for such acts. Finally, the sentence is reviewed to assure that the record does not manifest arbitrariness or discrimination. Each of these restraints has been applied effectively under the new act, and petitioner's sentence is demonstrably rational, authorized, and proportionate. He falls within a well-defined class of witness-elimination

murderers, on whom death sentences are consistently imposed.

II.

The General Assembly of Georgia has determined that the death penalty in Georgia serves effectively the purpose of a deterrent to other capital crimes, notably the elimination of a witness or witnesses to an armed robbery and other enumerated purposes. The General Assembly has determined that the protection of the citizens of this State from certain convicted criminals may only be accomplished through the use of the death penalty. Since the death penalty is the only effective deterrent for certain criminal behavior it is not excessive or unjustified and thus is constitutional under the Eighth Amendment.

I.

MEANINGFUL DISCRETION CHARACTERIZES THE GEORGIA DEATH PENALTY PROCEDURES.

A. Introduction

After Furman, the elected General Assembly of Georgia retained a discretionary death penalty but under controlled conditions. The statute, Ga. Laws 1973, p. 159, provides for a meaningful exercise of discretion by adding to the checks and balances, which already characterized Georgia procedure in any criminal case.

The General Assembly itself continues to determine when a death penalty may never be imposed. To the necessity of finding a defendant guilty of a capital crime, there is now added a requirement in all capital cases except treason and aircraft hijacking, that a statutorily-defined, aggravating circumstance be present beyond reasonable doubt. Together, these definitions of crime and punitive circumstance limit capital punishment to only the most outrageous crimes (manifesting democratic abhorrence and condemnation of such acts), and to crimes which especially need to be thwarted by the ultimate threat (e.g., treason and murder of public servants, whose duties place them in great danger).

If these criteria of crime and circumstance are satisfied, the General Assembly has given the trial judge and the trial jury the responsibility for

perceiving, through their firsthand knowledge, the varied and possibly subtle reasons for imposition and non-imposition in a given case. The Supreme Court of Georgia, in turn, has the responsibility for insuring even-handed sentencing. Through an "automatic and swift appellate review," it sees that no trial court imposes an unauthorized or arbitrary death penalty or one disproportionate to the penalties in similar cases. Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612 (1974).

The new format, which thus works to regularize the death penalty population, is not adrift in an otherwise arbitrary "non-system". To the contrary, it is anchored within a traditional, criminal justice process, whose course has always been bounded by reason: from its very beginning -- e.g., in a trained detective's first pursuit of a clue, like the tag number found beside the victim Moore in this case -- to the day of reckoning, for even clemency cannot be granted without joint, reasoned action by independent agencies, answerable to yet others.

B. Death Sentence Discretion is Confined by Aggravating Circumstance Criteria to Only the Most Abhorrent Crimes.

There are seven crimes for which, and only for which, the Criminal Code of Georgia authorizes the death penalty. These are murder, rape, armed robbery, kidnapping for ransom, kidnapping where the victim is harmed, aircraft hijacking, and treason. Ga. Code §§ 26-1101, -1311, -1902, -2001, -2201 (1972 Rev.); App. A. at 16a-18a. These capital felonies are defined as they were when Furman was decided, but the General Assembly narrowed the list in the death penalty statute of 1973 by eliminating capital perjury (perjury leading to another's sentence of death or imprisonment for life). Ga. Laws 1973, pp. 159, 163 [Ga. Code Ann. § 26-2401 (Supp. 1975)].

As of March 16, 1976, 41 death penalty cases had been docketed in the Supreme Court of Georgia under the 1973 Act, and 30 of these had been decided. 1/

1/ The figures are for individual cases. Two decisions announce dispositions of companion cases. Smith, a/k/a Machetti v. State, No. 30205, and Smith v. State, No. 30268 (Ga. S.Ct., Jan. 6, 1976) (husband and wife, premeditated murder for insurance); Prevatte v. State and Jordan v. State, 233 Ga. 929, 214 S.E.2d 365 (1975) (co-defendants).

Of the 19 full affirmances, the majority of the defendants, like petitioner, had committed murder. Goodwin v. State, No. 30587 (Ga. S.Ct., Feb. 24, 1976); Dobbs v. State, No. 30453 (Ga. S. Ct., Feb. 24, 1976); Pulliam v. State, No. 30594 (Ga. S.Ct., Feb. 24, 1976); Mason v. State, No. 30338 (Ga. S.Ct., Jan. 7, 1976); Smith v. State, Nos. 30205, 30268 (Ga. S.Ct., Jan. 6, 1976); Berryhill v. State, 235 Ga. 549, ___ S.E.2d ___ (1975); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975); Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1974); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974); Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974); Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974).

Three men are under death sentence for committing rape in especially serious circumstances (violent recidivism or brutality). Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975); Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974); Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974). One death penalty for kidnapping, where the victim was murdered, also has been affirmed. Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975). Death sentences for armed robbery have been imposed in several cases. However, armed robbery has effectively been eliminated from

the cases, in which a death sentence may be imposed, because the Supreme Court of Georgia, beginning with petitioner's own sentence review, has held that the rare imposition of death in Georgia armed robbery cases prevents its imposition in any more. Gregg v. State, 233 Ga. 117, 127, 210 S.E.2d 659 (1974); accord, Jarrell v. State, supra; Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974). 2/

2/ The remaining, decided cases are Brown v. State, 235 Ga. 644, ____ S.E.2d ____ (1975) (sentence hearing error); Barrow v. State, 235 Ga. 635, ____ S.E.2d ____ (1975) (improper instructions on confession); Banks v. State, 235 Ga. 121, ____ S.E.2d ____ (1975) (pre-trial discovery error); Tamplin v. State, 235 Ga. 20, rev'd on rehearing, 235 Ga. 774, ____ S.E.2d ____ (1975) (Witherspoon error); Stack v. State, 234 Ga. 19, 214 S.E.2d 514 (1975) (evidence error); Prevatte v. State, 233 Ga. 929, 214 Ga. 365 (1975) (argument error); Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1974) (Witherspoon error); Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974) (death sentence disproportionate to similar rape case penalties); Atkins v. State, 231 Ga. 411, 202 S.E.2d 62 (1973) (1973 Act held not to apply to crime preceding effective date); Anderson v. State, No. 28527 (Ga. S.Ct., Apr. 8, 1974) (appeal dismissed as premature).

The capital defendant's guilt or innocence is determined in the traditional manner in the first phase of a bifurcated trial. Ga. Laws 1973, pp. 159, 162, [formerly Ga. Code Ann. § 27-2534, now substantially unchanged by Ga. Laws 1974, p. 352, Ga. Code Ann. § 27-2503 (Supp. 1975)] (not guilty pleas); Ga. Laws 1973, pp. 159, 171 [Ga. Code Ann. § 27-2528 (Supp. 1975)(guilty plea); App. A. at 4a, 6a, 7a]. This may be done by jury trial, bench trial, or guilty plea. Id. Whoever has made the determination of guilt also determines the sentence, and the basic procedure is the same in each instance. In the case of a bench trial or jury trial,

> "The court shall . . . conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence and aggravation as the State has made known to the defendant prior to his trial, shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel

> and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. . . ." Ga. Laws 1973, pp. 159, 162, now substantially unchanged by Ga. Laws 1974, pp. 352, 357 [Ga. Code Ann. § 27-2534, superseded by § 27-2503 (Supp. 1975), App. A at 4a, 7a].

Evidence presented during the guilt or innocence phase of a bench or jury trial may be considered during the sentencing phase without the need to resubmit it. Eberheart v. State, 232 Ga. 247, 253, 206 S.E.2d 12 (1974). Essentially the same procedure is followed in the case of a guilty plea, with the judge considering the factual basis as well as evidence in aggravation and mitigation. See Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829 (1974); Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974). "Mitigation" and "aggravation" are given their ordinary meanings (see T. 476), and the defendant is given wide leeway in presenting evidence.

See Brown v. State, 235 Ga. 644, 647-50, ____ S.E.2d ____ (1975).

The jury's verdict is not effective to impose death unless it affirmatively sentences the defendant to death. Ga. Laws 1973, pp. 159, 165, 170 [Ga. Code Ann. §§ 26-3102, 27-2534.1(c); App. A. at2a,11a]. The judge is bound by the jury's recommendation and if the jury cannot agree, the judge imposes a sentence less than death. Cf. Turner v. State, 235 Ga. 826, 830, ____ S.E.2d ____ (1976) (Decided under Ga. Laws 1973, pp. 159, 162, probably unchanged by Ga. Laws 1974, pp. 352, 357, though the language is less clear).

In most cases, before the death penalty may be considered after a finding of guilt, there is yet another pre-requisite. [For the instructions given in this case, see T. 475-76.]

In the cases of treason and aircraft hijacking, the General Assembly has found sufficiently grave implications in the commission of these crimes themselves to let guilt alone serve as the threshold for consideration of the death penalty. However, in the case of murder, armed robbery, rape, or either kidnapping, the General Assembly has determined to limit the death penalty consideration to those situations in which a "statutory aggravating circumstance" is present. Ga. Laws 1973, pp. 159, 165-170 [Ga. Code Ann. §§ 26-3102, 27-2534.1(c) (Supp. 1975) App. A at2a,11a]. The 1973 Act defines these statutory aggravating circumstances as follows:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."
Ga. Laws 1973, pp. 159, 164-65 [Ga. Code Ann. § 27-2534.1(c) (Supp. 1975) App. A at 11a].

If there is sufficient evidence to submit a statutory aggravating circumstance to the jury, the circumstance is defined in oral and written instructions, which go out with the jury. Not only must the jury affirmatively recommend death to make such a verdict effective, it also must indicate in writing, signed by the jury foreman, which aggravating circumstances it found. Ga. Laws 1973, pp. 159, 165 [Ga. Code Ann. § 27-2537(c) (Supp. 1975) App. A at 12a]. [The written instructions and verdict in this case are at R. 12, 15.] The trial judge has no discretion if the jury returns a verdict finding aggravating circumstances and imposing the death penalty; the trial judge must impose the death sentence. Ga. Laws 1973, pp. 159, 170, 171 [Ga. Code Ann. §§ 26-3102, 27-2514 (Supp. 1975) App. A at2a,29a]; Mason v. State, No. 30338 (Ga. S.Ct., Jan. 27, 1976) (T. 9). Although the prosecutor is not required to give notice of statutory aggravating circumstances whose proof occurs during the guilt or innocence phase of trial, cf. Hooks v. State, 233 Ga. 149, 150, 210 S.E.2d 668 (1974), petitioner did have such notice in this case. (R. 6).

There are several unifying themes within the statutory aggravating circumstances. Part of the themes are counterparts to the social implications already strongly inherent in treason against the State and hijacking of an airliner. Thus, these definitions are directed against violent recidivists and multiple offenders, Ga. Code Ann. § 27-2534.1(b)(1)(2); also, against those persons, who make death a group or commercial enterprise, Ga. Code Ann. § 27-2534.1(b)(4)(6); who threaten or kill in public groups or in immediate defiance of the public order, particularly its criminal justice system, Ga. Code Ann. § 27-2534.1(b)(3)(5)(8)(9)(10); or whose crimes are especially horrible and contemptible, e.g., in the use of torture. Ga. Code Ann. § 27-2534.1(b)(7). App. A. at 8a - 10a.

These crimes and circumstances, in other words, serve the purpose of expressing society's ultimate condemnation of the crime committed. Some serve the purpose of adding greater protection for public servants, who face greater risks of criminal attack on our behalf. And some serve to warn those more prone to commit such crimes: escapees, prisoners, and capital felons.

The most frequently applied statutory aggravating circumstance has been the commission "of murder, rape, armed robbery, or kidnapping . . . while the offender was engaged in the commission of another capital felony." Ga. Laws 1973, pp. 159, 164-65 [Ga. Code Ann. § 27-2534.1(b) (2) (Supp. 1975)]. Of these, the most common instance has been callous elimination of a witness to a

crime of greed or selfishness, usually armed robbery. Pulliam v. State, No. 30594 (Ga. S.Ct., Feb. 24, 1976); Goodwin v. State, No. 30587 (Ga. S.Ct., Feb. 24, 1976); Dobbs v. State, No. 30453 (Ga. S.Ct., Feb. 24, 1976); Berryhill v.State, 235 Ga. 549, ____ S.E.2d ____ (1975); Tamplin v. State, 235 Ga. 20, ____ S.E.2d ____, rev'd on reh., 235 Ga. 774, ____ S.E.2d ____ (1975); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975); Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1974); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974); Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); Cf. Dobbs v. State, No. 30453 (Ga. S.Ct., Feb. 24, 1976); Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974) (elimination of rescuing officer).

While not applied as frequently, the other statutory aggravating circumstances also have served already to control discretionary death penalty imposition in a rational, understandable way. Jury decisions and Supreme Court of Georgia review have added content to the statutory format.

Two cases illustrate the need seen by the General Assembly to warn violent recidivists not to continue their disrespect for the lives of others. In

the only death penalty case docketed under the 1973 Act, which can be described as involving a domestic or personal quarrel, Guy Mason shot his girlfriend in anger. Mason v. State, No. 30338 (Ga. S.Ct., Jan. 7, 1976). The aggravating circumstance -- and the key factor in comparative sentencing, -- was Mason's previous conviction for murder.

Similarly, Anthony Erlich Coker escaped from prison, raped a young mother three weeks after the birth of her child, and drove off with her and her car until officers caught up and rescued her. Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975). Under such circumstances, as vicious as they were, he might have had grounds to argue that when the rescue prevented further harm to the woman, it also rendered the death penalty excessive. See Coley v. State, No. 28131, 231 Ga. 829, 204 S.E.2d 612 (1974). However, Anthony Erlich Coker had not just committed a minor capital felony before, he had both raped and murdered. Coker v. State, No. 29758, 234 Ga. 555, 216 S.E.2d 782 (1975) (transcript of pre-sentence hearing at p. 48 et seq.); Echols v. State, 231 Ga. 633, 634, 203 S.E.2d 165 (1974) (describing his participation in earlier rape-murder). In contrast, Jessie Lee Coley, supra, had crossed the threshold to death sentence liability under the recidivist circumstance by a relatively minor sentence of 19 years for armed robbery (T. 243; Report of the Trial Judge, second page), and the two cases together illustrate why the aggravating circumstances are pre-requisites, not death knells by themselves. See, p. 47 -56, infra.

When subjective elements occur in the definitions of the statutory aggravating circumstances, they are criteria whose occurrence is within the scope of common human understanding. In addition, while their factual determination is the responsibility of the judge or jurors, who set the sentence, the Supreme Court of Georgia must find legally sufficient evidence to support the determination on sentence review, and in this process the definitions are further refined. Ga. Laws 1973, p. 159, 166 [Ga. Code Ann. § 27-2537(c)(2)(Supp. 1975) App. A. at 12a].

For example, Marcus Wayne Chenault entered a church on Sunday morning and sprayed the congregation with pistol shots in an act of terrorism, killing Mrs. Martin Luther King, Sr., and another person. The Supreme Court of Georgia had no difficulty in affirming a jury's determination that Chenault had "knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person." Ga. Laws 1973, p. 159, 164 [Ga. Code Ann. § 27-2534.1(b)(3)(Supp. 1975)]. Chenault v. State, 234 Ga. 216, 216-217, 225-26, 215 S.E.2d 223 (1975). In contrast, the State argued in the case of David Jarrell that his kidnapping of Mala Still at pistol point in a shopping center parking lot, without more,

satisfied the same criterion. In holding that no evidence supported the determination, the Supreme Court lent credence to the proposition that the statutory aggravating circumstances are meant to be applied as confining agents, in a straightforward manner, and in consideration of their context as well as common understanding. Jarrell v. State, 234 Ga. 410, 410-12, 216 S.E.2d 258 (1975); see United States v. Crockett, 506 F.2d 759, 762 (5th Cir. 1975) (judge not required to further paraphrase terms reasonably within understanding of jury).

In a typical case, juries understand the concepts easily. As Amicus points out, anyone who commits a capital felony can be said to have a depraved mind. Brief for the NAACP, as Amicus Curiae, at 32. However, a jury has only to draw on its common human experience to understand the confining role and meaning the General Assembly intended when it authorized death for murders, rapes, kidnapping, and armed robbery, which are "outrageously or wantonly vile, horrible or inhuman in that [they] involved torture, depravity of mind, or an aggravating battery to the victims." Ga. Laws 1973, pp. 159, 165 [Ga. Code Ann. § 27-2534.1(b)(7) (Supp. 1975)].

For example, petitioner's own jury refused to make such a finding in this case (R. 12-18; T. 474-75, 479), but it was clear to all concerned, including the jury, that Timothy McCorquodale had committed such a crime. McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974) (murder preceded by horrifying torture).

Amicus contends also that "torture" in this same aggravating circumstance has "no perceptible boundaries" and cites Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974). Brief of N.A.A.C.P. as Amicus Curiae at n. 28, p. 33. Overlooked in this contention are the events which occurred in the William Lloyd Martin home in Atlanta when defendant Floyd and his cohorts arrived on December 12, 1973.

Floyd and his companions came to get money they believed to be in the home, but they did not stop at that. Young Ginger Martin, and apparently her mother also, were gagged by having thick socks stuffed into their mouths. At times, they were marched up and down stairs as if to harass them. They were subjected to the terror of being isolated from each other, and while they were apart, Mrs. Martin was told by defendant that he would cut off her daughter's fingers if Mrs. Martin did not tell him where the money was. The elimination murders were accomplished in a taunting manner. Defendant Floyd later laughed in recalling how Mrs. Martin put her hands up as if to hide from the pistol aimed at her,

and how, before he killed Ginger Martin, he bent over and kissed her. (T. 193, 201, 204-05, 245).

In affirming the determination that this aggravating circumstance was present, the Supreme Court of Georgia correctly declined to hold that the moments of terror in the Martin home were not torture and in doing so did not render the meaning of torture in any way imperceptible. Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974) (arguably dictum because armed robbery sentence vacated as disproportionate.

Aggravated battery is said to make the death penalty available in every murder because it occurs in every case and is authorized as a prerequisite in Ga. Code Ann. §§ 27-2537(b)(2) and (7). Brief for N.A.A.C.P. as Amicus Curiae, at 32, n. 26, citing Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975). The decision cited illustrates the misunderstanding.

In Mitchell v. State, supra, the defendant held up a family grocery, murdered the 14-year-old son, and in two separate instances, shot the boy's mother in the back of her head and her body. The aggravated battery was to the mother; i.e., the district attorney was proceeding under current commission of an aggravated battery to another, Ga. Code Ann. § 27-2534.1 (b)(2) only, rather than to the victim. Ga. Code Ann. § 27-2534.1(b)(2) and (7); App. A at 9a, 10a.

See the transcript at p. 54-55; and the record at R. 8, 18. Mitchell v. State, supra; accord, Dobbs v. State, No. 30453 (Ga. S.Ct., Feb. 24, 1976).

If a prosecutor intends to rely on the concurrent commission of an aggravated battery to the victim, Ga. Code Ann. §§ 27-2534.1(b)(2)(7), it is probable, though not yet litigated, that he would need to prove a violation of Ga. Code § 26-1305 (aggravated battery) apart from the infliction of the murder wounds. The 1968 Criminal Code Committee Notes say that aggravated battery replaces the former crimes of mayhem, Ga. Code Chapter 26-12 (1933), under whose cases the intent to commit mayhem was specific. See, Swain v. State, 91 Ga. App. 561, 564, 86 S.E.2d 642 (1954)(holding verdicts inconsistent when for both mayhem and assault with intent to kill).

Although not applied in this way, an example of separate infliction of wounds constituting aggravated battery on the murder victim would be the ordeal of cuts, bites, and chemicals inflicted in McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974). McCorquodale also illustrates the fallacy in criticizing this aggravating circumstance because "it can make little difference to a dead man whether he can lift his right leg." Black, Punishment: The Inevitability of Caprice and Mistake 67 (1974), quoted in Brief

of N.A.A.C.P., as Amicus Curiae, at 32 n. 26. It can make a great deal of difference to the victim while he or she is alive that his or her body is being disfigured violently. 233 Ga. at 370-71.

It is just as misleading to suggest that a statutory aggravating circumstance is present in every rape on the premise that rape necessarily involves kidnapping with harm to the victim in virtually every case. Rape is "carnal knowledge of a female, forcibly and against her will." Ga. Code § 26-2001, App. A at 18a. Rape may occur without an "(abduction)" or "(stealing away)", a necessary element in any kidnapping. Ga. Code § 26-1311, App. A at 17a.

Amicus asserts that "no restriction remains available to limit the evident expansiveness of the words 'for the purpose of receiving . . . any . . . thing of monetary value.'" Brief of N.A.A.C.P. as Amicus Curiae at 31, n. 25, discussing Ga. Laws 1973, pp. 159, 164 (Ga. Code Ann. § 27-2534.1(b)(4). The oversight is in not acknowledging that criteria may overlap, yet still confine, and still have meaningful, mutually exclusive concerns.

Petitioner's case does illustrate a murder aggravated by armed robbery, Ga. Code Ann. § 27-2534.1(b)(2), and when this occurs there is also murder for monetary value. Ga. Code Ann. § 27-2534.1(b)(4); App. A at 9a.

Also, whenever a "nit man" carries out instructions to kill, he murders both for monetary value and at the direction of another. Ga. Code Ann. §§ 27-2534.1 (b)(4)(6). Cf. Smith v. State, No. 30205, Ga. S. Ct., Jan. 6, 1976 (couple killed her husband and girlfriend for insurance proceeds). However, the person who kills alone in order to receive a beneficiary's proceeds or legacy is within the fourth circumstance but not the second or sixth, and the person who has a partner to kill solely to resolve a love triangle enters the group defined only by the sixth circumstance and not the second or fourth.

In summary, the "statutory aggravating circumstances" do operate in a rational way to confine jury discretion to impose the death sentence. They limit the imposition to the most outrageous cases, along straightforward guidelines, and in doing so, they also implement sound legislative policy determinations.

C. Structuring of Discretion Continues at the Appellate Level.

The 1973 death penalty procedures provide "for automatic and swift appellate review." Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612 (1974). The review referred to actually is one of two aspects in appellate consideration of the death penalty case in Georgia. In every case there is an automatic review of the sentence itself. Ga. Laws 1973, p. 159, 165-66 [Ga. Code Ann. § 27-2537 (Supp. 1975), App. A at 11a]. In addition, each defendant may (and has) pursued a normal appeal in the traditional manner. Ga. Laws 1973, p. 159, 167 [Ga. Code Ann. § 27-2537(i) (Supp. 1975); App. A at 13.1a]. The appeal is for review of conventional error, and the sentence review requires the Supreme Court to determine whether the statutory imposition of the death penalty is unconstitutional as applied in each given case. E.g., Mitchell v. State, 234 Ga. 160, 162, 214 S.E.2d 900 (1975).

Thus, on sentence review, the Supreme Court is required to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

"(3) Whether the sentence of death is excessive or disproportionate to the sentence imposed in similar cases, considering both the crime and the defendant." Ga. Laws 1973, pp. 159, 166 [Ga. Code Ann. § 27-2537(c)(1)(2)(3) (Supp. 1975), App. A at 12a].

Sentence review is expedited. When a death penalty is imposed, the trial judge, the clerk, and the court reporter are all instructed to give priority to the death case in moving it from judgment to the three-phase review by the Supreme Court. The reporter has to give the transcript "priority . . . over all other cases", and has to prepare it "at the earliest possible time". Ga. Laws 1973, pp. 159, 169 [Ga. Code Ann. § 27-2401 (Supp. 1975); App. A at 4a]. The judge must give priority to motions for new trial in death cases, and in contrast to the ordinary case, cannot extend the time for preparing and filing the transcript. Ga. Laws 1973, pp. 159, 168-69 [Ga. Code Ann. § 70-301 (Supp. 1975); App. A at 13.1a]. The trial court clerk must "transmit the entire record and transcript" to the Supreme Court within ten days after receiving the transcript. Ga. Laws 1973, pp. 159, 165-66 [Ga. Code Ann. § 27-2537(a) (Supp. 1975); App. A at 11a].

The trial court must include in the record the "trial judge's report", a supplemental characterization of the case for use of the Georgia Supreme Court in reviewing the sentence. Ga. Laws 1973, pp. 159, 166 [Ga. Code Ann. § 27-2537(a); App. A at11a]. The six and a half page questionnaire asks for personal information about the defendant and the case. [The trial judge's report in this case is in the record, and it is Appendix B to this Brief.

The report is served upon defense counsel, and it requires the trial judge to characterize the trial in several ways designed to test for arbitrariness and disproportionality. For example, there are six questions about whether race played a role in the case. In another question, the trial judge is required to say whether the evidence forecloses "all doubt respecting the defendant's guilt." In another question, he is required to comment on whether the sentence was appropriate. Seven questions concern the defendant's representation. See App. B.

The significance of the report is illustrated in the case of Stack v. State, 234 Ga. 19, 214 S.E.2d 514 (1975). From certain evidence at trial, the jury might have been able to infer that the defendant had flunked a lie detector test (evidence inadmissible under Georgia law). One reason for reversing conviction on this ground was the trial judge's indication in his report that the evidence in the

case did not foreclose all doubt. [This is question No. 11 in the trial judge's report. In this case see App. B at 4b. [3]

Each of the three review criteria has been a factor in appellate disapproval of trial level sentence imposition. Cases illustrating the review for sufficiency of the evidence for a finding of a statutory aggravating circumstance already have been discussed, supra, p.[27] . Ga. Laws 1973, pp. 159, 166 [Ga. Code Ann. § 27-2537(c)(2)(Supp. 1975); App. A at 12a]. Jarrell v. State, 234 Ga. 410, 424, 216 S.E.2d 258 (1975).

The structuring of discretion begun with the trial level determination of aggravating circumstances is continued in the other two phases -- sentence review for arbitrariness and sentence review for disproportionality. Ga. Laws 1973, pp. 159, 166 [Ga. Code Ann. § 27-2537 (c) (1) (3) (Supp. 1975); App. A at 12a]. There can be no doubt about the importance

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[3] In addition to Stack v. State, 234 Ga. 19, 214 S.E.2d 514 (1975), two other death penalty convictions have been reversed in full. Barrow v. State, 235 Ga. 635, ____ S.E.2d ____ (1975) and Banks v. State, 235 Ga. 121, ____ S.E.2d ____ (1975). Four death penalties, as opposed to convictions, have been reversed for conventional error. Brown v. State, 235 Ga. 644, ____ S.E.2d ____ (1975); Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975); Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1974); Atkins v. State, 231 Ga. 411, 202 S.E.2d 62 (1973)(1973 death penalty procedures held inapplicable

of these two criteria in the General Assembly's retention of a narrowed, discretionary statute.

The Furman opinions, read as a whole, should not be read to invalidate the death penalty. Instead, they should be read as disapproval of the manner in which it was imposed in the country in general at that time. Discretion was not condemned; discrimination and arbitrariness were.

The General Assembly of Georgia has determined not to eliminate the authority of a judge and a jury to tailormake the punishment to an individual in each given case. In authorizing juries and judges to apply their own community values and first-hand understanding of all the facts in a given case, the General Assembly has reiterated policies acknowledged by the Court in Witherspoon v. Illinois, 391 U.S. 510 (1968); and McGautha v. California, 402 U.S. 183 (1971).

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[3] / fn continued

to crimes committed prior to effective date of 1973 Act although trial held afterwards).

The problem faced by the General Assembly in 1973 was how to continue to allow the defendant and society the benefit of the trial jury and trial judge's first-hand understanding, while at the same time to see that the discretion was not exercised arbitrarily or unfairly. The check is made through appellate sentence review i.e., by having the Supreme Court of Georgia decide in each individual case whether the record precludes an arbitrary or disproportionate imposition of sentence.

The concept of arbitrariness has a broad reach as a factor in sentence review. In each case, of course, the Supreme Court will give careful consideration to the record, the trial judge's report, and argument of counsel. But the arbitrariness criterion goes beyond looking at factual arbitrariness. For example, the criterion has been used explicitly to allow the court to reach around the normal procedural rule that error must have been preserved at the trial level. Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1974).

In Owens, supra, when a defendant under death sentence complained about the exclusion of prospective jurors, who expressed conscientious objection to capital punishment, the transcript of the voir dire was missing and could not be completed. The state moved to supplement the transcript, through the trial court, in accordance with regular appellate procedures. However, the Supreme Court

denied the motion and also refused to apply the usual rule that requires a party asserting error "to show it affirmatively by the record." 233 Ga. at 871. The death sentence was vacated and the case was remanded for a new trial on the sentencing phase only. The court held that "post-trial examination of lawyers and court officials, or of excluded veniremen, would not be a satisfactory means . . . to perform its review function" and gave as its rationale, in part, that it was required to determine "'whether the sentence of death was imposed under the influence of . . . any . . . arbitrary factor.'" 233 Ga. at 871, 72. See also Prevatte v. State, 233 Ga. 929, 930-32, 214 S.E.2d 365 (1975).

The first two criteria of sentence review, the search for arbitrariness and the presence of an aggravating circumstance, are meant to insure fairness within the context of the immediate case. The search for disproportionality in the sentence is meant to insure fairness when the case is compared to other, similar cases. Traditionally, the focus has been on the nature of the crime and, more recently, the nature of the criminal himself - the latter explored through pre-sentence investigations and bifurcated trials. See Ga. Laws 1974, pp. 352, 357 [Ga. Code Ann. § 27-2503 (Supp. 1975); App. A at 4a.] Now, there is concern, not limited to capital cases, with the interrelationships among sentences of different offenders, considering the defendant and his crime and other defendants and their crimes.

Compare, Ga. Laws 1973, p. 159, 166 [Ga Code Ann. § 27-2537(c)(3) (Supp. 1975)] (comparative sentencing, capital case) with Ga. Laws 1974, p. 352, 358 [Ga. Code Ann. § 27-2511.1 (Supp. 1975)] (comparative sentencing, other felony cases).

The 1973 Act gives the Supreme Court of Georgia the responsibility of determining "[w]hether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann. § 27-2537(c)(3); App. A at 12a. Each decision must announce the similar cases considered by the Court. Ga. Laws 1973, p. 159, 166 [Ga. Code Ann. § 27-2537(e)(Supp. 1975) App. at 13a. For purposes of obtaining cases for comparison, the Court,

> "shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate." Ga. Laws 1973, p. 159, 167 [Ga. Code Ann. § 27-2537(f) (Supp. 1975); App. A at 13a].

To assist the Georgia Supreme Court primarily in preparing extracts of these records, a new position is created on the staff of the Court:

> "There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. . . . The Assistant shall provide the Court with whatever extracted information it desires with respect (to the records of the capital felony cases) including but not limited to a synopsis or brief of facts in the record concerning the crime and the defendant.
>
> "The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.
>
> "The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes." Ga. Laws 1959, pp. 159, 167 [Ga. Code Ann. § 27-2537(f)(g)(h) (Supp. 1975) App. A at 13a, 13.1a].

The court has announced that the cases initially considered for comparative sentencing include this pool of all Georgia Supreme Court records from January 1, 1970. Smith v. State, No. 30268 (Ga. S.Ct., Jan. 6, 1976); Jarrell v. State, 234 Ga.

410, 425, 216, S.E.2d 258 (1975). The Court's pool of cases for comparative sentencing in rape cases include at least one decision preceding January 1, 1970. Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968), cited in Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975); Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974); Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974), and Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

Provided that the other records are properly made a part of the record in a pending death penalty case, the Supreme Court will consider similar cases not brought before it earlier on their own appeal. See Moore v. State, 233 Ga. 861, 863, 213 S.E.2d 829 (1974); Ross v. State, 233 Ga. 361, 366, 211 S.E.2d 356 (1974).

However, the existence of one "similar" case in which a life sentence was imposed does not by itself mean that a death penalty defendant's sentence is "disproportionate". To the contrary, the Georgia Supreme Court has said:

> "As we view the court's duty in light of the Furman and Jackson cases and the statutory provisions designed by the Georgia legislature to meet the objections to those cases, this court is not required to determine that less than a death sentence was never imposed in a case with similar characteristics. On the contrary, we view it to be our duty under the

> similarity standard to assure that no death penalty is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly and freakishly' imposed. . . ." Moore v. State, 233 Ga. 861, 863-64, 213 S.E.2d 829 (1974).

Compare Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612 (1974):

> "The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts, it will be set aside as excessive."

Petitioner Gregg complains that he is the victim of capricious sentencing. Yet the reported cases under the 1973 Act now clearly establish the proposition that he is a member of an abhorrent but nevertheless cohorent group. It is not at all unusual or freakish, and, in fact, frequently occurs,that a Georgia judge or jury imposes the death sentence, when a murder is committed in the course of an armed robbery or other capital felony for the purpose of callously eliminating witnesses. See Smith v. State, No. 30205 (Ga. S. Ct. Jan. 6, 1976) ("multiple murders"); Goodwin v. State, No. 30587 (Ga. S.Ct., Feb. 24, 1976)(murders committed in the course of another felony); Tamplin v. State, 235 Ga. 20, ____ S.E.2d ____

(1975)("witness to a robbery . . . killed or an attempt . . . made to kill such witnesses."), rev'd on other grounds, 235 Ga. 774, ____ S.E.2d ____ (1975); Jarrell v. State, 234 Ga. 410, 425, 216 S.E.2d 258 (1975)("murders wherein all of the witnesses were killed or an attempt was made to kill all of the witnesses"); Moore v. State, 233 Ga. 861, 865, 213 S.E.2d 829 (1974) ("murder of the victim of a robbery or burglary committed in the course of such robbery or burglary"); see also, Dobbs v. State, No. 30453 (Ga. S.Ct., Feb. 24, 1976); Goodwin v. State, No. 30587 (Ga. S.Ct., Feb. 24, 1976); Berryhill v. State, 235 Ga. 549, ____ S.E.2d ____ (1975); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1934).

Each of these decisions was affirmed after the Supreme Court had examined its records pursuant to Ga. Code Ann. § 27-2537(c)(3), App. A at 12a, and determined that in cases like petitioner's and those cited, the extreme sanction is not viewed by society as something to impose only rarely or freakishly.

The cases have arrived at the Georgia Supreme Court with regularity and in a coherrent pattern.

But the argument is made that in petitioner's case, and others, the similar cases selected for comparison include cases not prosecuted under the 1973 act. Thus, it is said, the arbitrariness condemned by Furman is carried forward. Brief for Petitioner at 31-32.

There are two answers to this. First, the cases decided under the new, post-Furman procedures show clearly that when the guidelines are in effect, a consistent pattern of death sentences results. Second, when the pre-Furman cases are considered for comparative sentences, their whole records are examined by the court, which now has the benefit of both the Furman and 1973 statutory guidelines. Ga. Laws 1973, pp. 159, 167 (Ga. Code Ann. § 27-2537(f); App. A. at 13a). In effect, then, the selected cases themselves receive "sentence review" before the comparisons are made. By definition in petitioner's case, the court was concerned with witness elimination murder in the course of another capital felony -- i.e., cases which complied with the second, aggravating circumstance. Ga. Laws 1973, pp. 159, 164 [Ga. Code Ann. § 27-2534.1(b)(2)(Supp. 1975); App. A at9a]. A jury would have

been authorized to consider the death sentences in these cases under the 1973 act, and the court can determine whether the case is too arbitrary to serve as a comparison.

It is also said that the pool of similar cases is skewed by the absence of cases which were plea bargained, or were not appealed, or were found to involve lesser crimes. Brief for Petitioner at 19-22, 30-31. The assumption should be that prosecutors plea bargain in cases of the least culpability and the least conclusive evidence of guilt. In other words, the plea bargained cases are not similar cases to be selected for comparison. [Since the sentence is determined separately and is reviewed separately on appeal, the prosecutor need not feel unduly increased pressure that a whole conviction will be reversed because it is a death case. The sentence can be overturned separately.]

The issue in a lesser-included offense situation is, first, whether there is reasonable doubt about the greater offenses, and then whether the defendant is guilty of the lesser crime. That is precisely what the instructions were in petitioner's case. (T. 431-32, 439). See generally, Bailey v. State, 153 Ga. 413(1), 112 S.E. 453 (1922); Kimball v. State, 63 Ga. App. 183(7)(8), 10 S.E.2d 240 (1940). The discretion in this instance is one of guided decision-making, not absolute whimsey.

Indeed, the same may be said of each of the benchmarks in the traditional criminal process identified by petitioner as sources of arbitrariness. Questions of intent, insanity, reasonable doubt, and the like are decided by means of terms within common understanding. These words control the results in a non-arbitrary way. Only by violating its oath can the trial court or jury step outside the guidelines historicaly developed to lead to one correct result in a given case.

Nor does it skew the sample that there will be convictions of capital crimes, from which no appeal is taken. The problem has not been that isolated members of a well-defined group escaped death. The problem has been that isolated members did not escape it. Under the sentence review procedures of the Supreme Court of Georgia, as prescribed by the 1973 Act, each sentence is affirmed if, and only if, it can be demonstrated from records available to the Court that the sentence is frequently imposed in similar cases.

The death penalty is rarely imposed for any armed robbery, the Georgia Supreme Court has concluded from its examinations of the armed robbery records before it. Gregg v. State, 233 Ga. 117, 127, 210 S.E.2d 669 (1974). There is a message in this result for a person like petitioner, who selfishly commits a crime of greed,

such as armed robbery. In committing the crime he faces a dilemma. Harming the witness increases his culpability, but leaving the witnesses alone increases his chance of being caught.

The answer is not to commit the armed robbery at all, but petitioner and others unfortunately have not accepted that answer. In response, those who set sentences not infrequently reply that felons should at least have let their victims live, or rue the day.

Thus, the death penalty procedures passed in 1973 by the Georgia General Assembly serve several functions. They confine trial courts to considerations of the death penalty only in the most abhorred circumstances. They require careful appellate review of each sentence to insure its constitutionality. The sentence must be in an authorized category; it cannot be arbitrary; and it cannot be disproportionate to the punishments imposed in similar cases upon similar defendants. As implemented, the act has been accomplishing its goals and also has served to warn persons like petitioner that punishment of death will consistently be applied to those who take the lives of others in callous, selfish ways.

II.

The petitioner and the N.A.A.C.P., as Amicus Curiae, have attacked both the prosecutorial phase and the clemency phase of the Georgia criminal justice system as it relates to the administration of the death penalty. The attack is broad, sweeping, and replete with generalities. This portion of respondent's brief will address the various allegations directed against the prosecutor and the clemency aspect of the criminal justice system.

A. The Prosecutor -

At the outset, it should be noted that the tone of the argument used by petitioner and the N.A.A.C.P., Amicus Curiae, is set by a quote, in the Brief of the N.A.A.C.P., of dictum from an 1897 decision of the Supreme Court of Georgia. 4 / The dictum quoted states that the entire proceeding, from the time the case comes to him until the verdict, is under the direction, supervision and control of the district attorney. One wonders what happened to the trial judge and to defense counsel. For such an assertion to be advanced on behalf of petitioner and as an accurate picture of the prosecutor in Georgia is incredible.

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4 / Brief of N.A.A.C.P., as Amicus Curiae at 54.

Rather than controlling the "whole proceeding" the district attorney in Georgia is charged with controlling the State's side of the case. His duties are clearly set out by statute and are principally set out in Appendix A to this Brief. App. A at 20a. They include the duty to draw up all indictments or presentments, when requested by the grand jury, and to prosecute all indictable offenses. Ga. Code Ann. § 24-2908(4); App. A. at 22a. The district attorney has authority, on the terms prescribed by law, to enter a nolle prosequi on indictments. Ga. Code § 24-2915; App. A. at 23a. If it is before the case is submitted to the jury, consent of the court must be obtained, and, if after the case has been submitted to the jury, the consent of the defendant. Ga. Code § 27-1801; App. A. at 24a.

Attention should be given to the oath the district attorney makes upon entering office:

> "I do swear that I will faithfully and impartially, and without fear, favor, or affection, discharge my duties as district attorney, and will take only my lawful fees of office. So help me God." Ga. Code § 24-2902; App. A at 26a.

Also to be considered is the Code of Professional Responsibility, Ethical Consideration - EC 7-13 (1973 Rev.), App. A. at 21a which provides in part, that:

> "His duty is to seek justice, not merely to convict . . . (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute. . .; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. . . ."

This Ethical Consideration is fully applicable to district attorneys in Georgia. See Appendix to Title 9, Ga. Code Ann., Rule 3-107.

Obviously, the role of the prosecutor is one where a large degree of discretion is employed. However, there should be a presumption that the exercise of that discretion is like that of a judge and implies "conscientious judgment, not arbitrary action." See, State v. Shiren, 9 N.J. 445, 452, 88 A.2d 601 (1952). For the district attorney in Georgia who abuses his office, in addition to facing the electorate and the State Bar, he must contend with Ga. Code Ann. § 40-1617 which sets forth the particulars concerning the prosecution of a district attorney for misfeasance or malfeasance in office.

The case, Cargile v. State, 194 Ga. 20, 20 S.E.2d 416 (1942), states that the offense is "the wrongful or unjust doing of an act which the doer has no right to do, or failure to do what the law makes it his duty to do with evil intent or motive or due to culpable neglect." For an example of a recent prosecution of a district attorney in Georgia, see, Reynolds v. State, 132 Ga. App. 89, 207 S.E.2d 630 (1974).

Against the district attorney's oath, ethical directions and presumption that he is not performing his duties improperly or arbitrarily, what does the petitioner present to show arbitrariness? Only the bald assertion, based on a statement obtained from an assistant district attorney in another state in another region of the country, contained in a law review, that capital cases are particularly likely to be settled by plea bargaining because of the amount of time they consume in preparation and trial. 5 /

Can the same be said for prosecutors in Georgia? I think not. It has been this writer's observation that those cases in which the district attorney would seek the death penalty are no more

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5 / Petitioner's Brief at p. 19

likely for plea bargaining than any other case. But certainly a finding of arbitrariness cannot rest on bald assertions nor upon observations.

The petitioner uses the case Caldwell v. Paige, 230 Ga. 456, 197 S.E.2d 692 (1973), as an example of a plea bargain in a capital case. There the defendant committed the crime of rape in 1962; he was convicted and sentenced to death. The Supreme Court of Georgia affirmed. Paige v. State, 219 Ga. 569, 134 S.E.2d 793 (1964). In a habeas corpus action the Fifth Circuit reversed, requiring a new trial, Paige v. Potts, 354 F.2d 212 (5th Cir. 1965). In 1966 the district attorney accepted a plea of guilty and defendant was sentenced to life imprisonment. The petitioner does not inform us whether the prosecutrix was available for the second trial, nor as to the presence or absence of any other vital witness nor any other non-arbitrary factor which may have weighed in the district attorney's decision to accept a guilty plea some four years after the crime was committed. Instead, we are to assume that the district attorney acted arbitrarily.

Other than generalities and self-serving conclusions which do not merit serious consideration, e.g., the assertion that Georgia law provides no guidance or oversight to insure against arbitrariness

of district attorneys, 6/ as we have seen such guidance is afforded, the petitioner presents nothing to the Court upon which a conclusion could be drawn that any district attorney has acted arbitrarily in any case in Georgia. Conversely, the scantiness and lack of specific instances of arbitrariness in the arguments submitted in behalf of petitioner appear to indicate the soundness of the prosecutor in Georgia.

6/ Brief of N.A.A.C.P. as Amicus Curiae at 57.

B. Executive Clemency -

The briefs written on behalf of petitioner describe the role of executive clemency in Georgia as a "final lottery" 7/ "an absolute discretion" 8/ "is not and cannot be constrained by any bounds or principles of regularity" 9/ and "freakish mercy". 10/

Apparently, petitioner should be informed as to the policy of the State Board of Pardons and Paroles as set forth at pages 23, 24 of their Policies, Rules, and Regulations (1971). The policy requires that an application for the commutation of a death sentence must contain the grounds of the requested commutation in writing. Further, the policy requires that:

> "All persons sentenced to death will have their cases reviewed and decided by the Board, either upon the request of the condemned inmate, anyone in his behalf, or

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7/ Brief of N.A.A.C.P. as Amicus Curiae, at 65.

8/ Id. at 65.

9/ Id. at 66

10/ Petitioner's Brief at 34.

upon the Board's motion. The right will not be denied for lack of funds, friends, or means with which to have the case reviewed by this Board."

The policy also provides that the Board shall conduct a thorough investigation of each case including the background of the defendant, the circumstances of the offense, the conduct of the trial, a detailed study of the appellate record and extensive interviews with all persons whose knowledge might shed light on the case. Further, the policy states that among other specified guides in reviewing an application for commutation "(b) The Board respects the sentences of the Courts but will consider evidence or other facts showing extenuating circumstances or justification for commission of the crime."

In Georgia the State Board of Pardons and Paroles may act on the commutation of a death penalty only when the Governor has suspended said penalty. Constitution of Georgia, Ga. Code Ann. § 2-3011; Ga. Code Ann. § 77-511. App. A. at 38a. In addition, any such action must be reported to the General Assembly at its next regular session. Constitution of Georgia, Ga. Code Ann. § 2-3011; App. A at 35a. Thus, action

by the executive branch of State government in commuting a death sentence requires affirmative action by the Governor, a majority of the State Board of Pardons and Paroles, with an overview by the State legislature. In addition, for any abuse of his duties, a member of the Board may be removed for cause by unanimous vote of the Governor, Lt. Governor, and Attorney General. Constitution of Georgia, Ga. Code Ann. § 2-3011. Therefore, actions in the area of executive clemency are well regulated.

Again, it must be noted that the petitioner has not demonstrated any specific irregularity or arbitrariness in the area of executive clemency nor has he attempted to demonstrate such.

III.

THE DEATH PENALTY IS NOT PER SE CRUEL AND UNUSUAL PUNISHMENT CONDEMNED BY THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Standard of Review -

As the petitioner has appropriately noted 11/ the proper review by the Court in this case was enunciated by the Court in Weems v. United States, 217 U.S. 349, 378-379 (1910), when the Court held, in defining its role vis-a-vis a State legislature in providing punishments for crimes that:

> "However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by presumption of right and legality, and is not to be interferred with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitations, we repeat, but constitutional ones, and what those are the judiciary must judge."

11/ Brief of petitioner in Fowler v. N.C., pp. 105, 106, incorporated by reference of petitioner.

The Court disclaimed the right to assert a judgment against a legislature as to the expedience of its law.

Thus, the action of the General Assembly of Georgia, under review in this case, carries with it a "presumption of right and legality."

The Amendment to the United States Constitution basicly involved in the present case is, of course, the Eighth Amendment. This Amendment by its nature suggests a more prominent role for the State legislature than any other Amendment to the Constitution. It is doubtful if anyone would seriously argue that the legislature is not presumed to embody the basic standards of decency prevailing in the society. Such must be presumed in a democracy. And, indeed, the petitioner has presented nothing that would suggest that the General Assembly of Georgia has lost touch with the current social values of the citizens of this State. To invalidate Georgia's legislative enactments providing for a death penalty would have this Court encroaching upon an area squarely within the historic prerogative of the legislative branch, i.e., its duty to protect its citizens through the designation of penalties for prohibitable conduct. Weems, supra.

The basic principle of review enunciated in Weems, supra, was reiterated in Trop v. Dulles, 356 U.S. 86, 103 (1958):

> "Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids."

And more recently in McGautha v. California, 402 U.S. 183, 195 (1971):

> "Our function is not to impose on the States, ex cathedra, what might seem to us a better system for dealing with capital cases. Rather it is to decide whether the Federal Constitution proscribes the present procedures of these two States in such cases."

In the instant case, the petitioner has not only failed to show that the traditional penalty, the death penalty, is unconstitutional but even that it is unwise.

It may be noted that the petitioner urges upon this Court a "uniquely stringent standard of judicial review" under "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, supra, 356 U.S. at 101. It should also be noted that the case from which he lifts his standard unambiguously rejects his arguments, Trop v. Dulles, supra, 356 U.S. at 99.

Additionally, the petitioner urges that in this case the ordinary deference due to legislative judgment should be ignored because the imposition of a death sentence is fundamentally contrary to the basic values of our society. It would be interesting to determine how petitioner arrived at such a conclusion since as we have already seen the legislature is more likely to reflect the basic standards of decency prevailing in our society. The petitioner appears to be posturing that he is in better communication with society than the elected representatives of that society. The error in such a posture is apparent on its face. Since Furman v. Georgia, supra, 35 state legislatures have enacted statutes providing for the death penalty.

The petitioner is unable to mount any viable argument against the standard for review as enunciated in Weems v. United States, supra, 217 U.S. at 378, 379, that the judgment of the legislature is fortified by presumptions of right and legality and is not to be interfered with lightly when reviewed in connection with the Eighth Amendment. Conversely to the position taken by the petitioner, when reviewed in connection with the Eighth Amendment, which involves contemporary standards of social values, the legislative judgment takes on added dignity because of the likelihood that such a judgment more accurately reflects community values and standards.

It is clear that what the petitioner seeks is that this Court hold constitutionally impermissible a punishment clearly permissible under the Constitution at the time of its adoption and accepted as such by every member of the Court until Furman v. Georgia, supra. 12 / One must ask what has happened so suddenly as to cause the particular punishment to become so cruel as to become unconstitutional under the Eighth Amendment. The petitioner asks for the absolute prohibition of capital punishment for any crime, regardless of its depravity or impact on society.

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12 / Furman v. Georgia, 408 U.S. at 381 (dissenting opinion of Mr. Chief Justice Burger).

B. The Legislature in Enacting a Death Penalty Statute Determined that Such a Penalty was not Excessive And is Justified Under Certain Conditions.

In light of the arguments of petitioner that the capital punishment is an excessive punishment which serves no penal or social purpose, it becomes necessary to inquire into the reasons and justifications of state legislatures in thrity five states for restoring capital punishment as an available punishment after this Court's decision in Furman v. Georgia, supra.

(1) The petitioner is seeking to have this Court declare a statute of the State of Georgia unconstitutional for the reason, they state, that capital punishment serves no useful purpose and specifically that capital punishment is not a deterrent to crime. Upon what does the petitioner base his conclusion that capital punishment is not a deterrent? Apparently, upon various studies of crime rates of states with capital punishment as opposed to those states without such punishment and similar studies. The conclusions of such studies, that capital punishment is not a deterrent, is explained by the petitioner with the proposition that people who commit such violent crimes as would qualify them for capital punishment are

irrational people who do not respond as rational people would expect. Such an argument begs the question. While it is somewhat true that neither petitioner nor respondent can present to the Court real proof that capital punishment does or does not act as a deterrent to crime, several observations concerning the deterrent aspect of capital punishment should be made. This Court has long accepted the fact that capital punishment serves as a deterrent. In Trop v. Dulles, supra, 356 U.S. at 111, Mr. Justice Brennan in a concurring opinion stated:

> "Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and the insulation of society from dangerous individuals by imprisonment or execution."

See also, Weems v. United States, supra, 217 U.S. at 381.

How can it possibly be said that the death penalty does not act to deter would-be crime perpetrators from carrying out their schemes? In Powell v. Texas, 392 U.S. 514, 531 (1968), the Court presumed that the very existence of criminal sanctions

serves to reinforce condemnation of murder, rape and other anti-social conduct. It cannot, on the other hand, be presumed that the threat of death has not stayed the hand and saved the life, simply because the penalty has failed to deter those who commit capital felonies. Statistics probably could never be gathered to positively prove how many capital crimes were averted by the existence of the death penalty, for no census gatherer or poll-taker could persuade even one person to admit that he would have committed a murder but for the knowledge that he might have received the death penalty. It is in the very nature of man to recoil the most strenuously from forfeiture of his life. Although this deterrent effect cannot for lack of knowledge be measured conclusively in terms of the numbers of capital crimes not committed, other indications of the prevailing belief in the superior deterrent effect of the death penalty are recitable.

It may be noted that the legislatures which have abolished capital punishment for some crimes have retained it for certain other crimes, notably for murder committed by certain prisoners and for the murder of law enforcement officers and certain persons in prison. What primary purpose could these carefully selected exceptions have other than deterrence? Certainly the exceptions do not bear witness to a greater value being placed on some victims' lives than on others. There can be

no real doubt that it was a policy determination by the legislatures in those states that the death penalty is a deterrent. It has recently been pointed out that in the years since the Six Day War in the Middle East many Arab terrorists have been incarcerated in Israeli prisons. 13/ The terrorists, serving long term prison sentences and knowing that Israel does not have the death penalty and knowing nothing they will do will bring about a more serious punishment than the years in prison they already face, have murdered their cell mates and admitted the act showing the wardens the instruments they used. 14/ Additionally, the threat of the death penalty for armed robbery palpably has served as a deterrent; it is common knowledge that robbers frequently accomplish their ends with unloaded weapons. Can it be said that this is not because they were aware that an armed robbery could draw the death penalty but an unarmed robbery could not. 15/ Equally, it may be argued

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13/ Leiser, Burton M., LIBERTY, JUSTICE, AND MORALS, (New York: MacMillan Pub. Co., 1973), p. 222.

14/ Jerusalem Post, p. 8, July 9, 1974

15/ Criminal Code of Georgia §§ 26-1901, 26-1902; App. A at 18a.

that the dramatic upswing 16/ in the number of murders committed during the commission of an armed robbery (the witness elimination murder) has been, to some degree, caused by the general belief in the criminal community, following the Court's decision in Furman v.Georgia, supra, that the death penalty had been overturned.

The petitioner, as we previously noted, argues that all those who commit capital crimes are irrational and therefore are not deterred by any punishment. However, the more reasonable view is that except for the insane (not punishable) and those fanatics who would welcome martyrdom, men generally weigh the costs or risks of the acts they contemplate. When the risk or the cost of an act is too high, men usually do not do it.

Even the Royal Commission found that there was some evidence to support the conclusion that the penalty of death is likely to have a stronger effect as a deterrent than any other form of punishment. 17/

16/ Unpublished computer print-out Georgia Department of Offender Rehabilitation, March 12, 1976.

17/ Report of Royal Commission on Capital Punishment, 1949-1953, § 68, at 24.

If human life is sacred (on this petitioner and respondent would probably agree) and if the threat of capital punishment deters some murders, then capital punishment should be retained. At the cost of some lives, more may be saved - the lives of those who would have been the victims of murderous assaults and the lives or liberties of those who have been deterred. If there is a genuine reverence for human life, there must at least be as much concern for the lives of those who are the innocent victims of capital crimes as for those who have been convicted of a capital crime. The assailant is often seen as an object of pity, as a victim of circumstance beyond his control. However, pity for the defendant should not be permitted to misguide us into disregard for his victims and future victims. The Supreme Court of Georgia noted long ago in Eberhart v. Georgia, 47 Ga. 598, 610 (1873), [18] that:

> "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false

[18] Case is not reported in a regional reporter.

> humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which bloody deeds occur."

Petitioner's brief, by incorporation, is replete with partial statistics, assertions of unconfrontable "experts", and all types of "objective indicators" which allow not of cross-examination and which are not subject to the rules of evidence. It is submitted that the standards intended by the statement that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" [19] are standards of fundamental significance not capable of measurement by a judicial tribunal confined to the evidence in the record of a case and ill-equipped for wide-ranging factual investigation or the gathering of conflicting evidence. The scope and magnitude of the "evidence" offered by petitioner itself bespeaks an attempt that would more fittingly be directed to a legislature.

[19] 356 U.S. at 101.

The petitioner in this case has presented no convincing evidence that capital punishment does not in fact deter or prevent the commission of at least some capital crimes. One should bear in mind that petitioner's burden is to establish the unconstitutionality claimed. As reemphasized by the Court in McGautha v. California, supra, 408 U.S. at 451, a heavy burden rests on those who attack the legislature's judgments to prove the lack of rational justification. It is a rule of long standing that legislative decisions which fall within the special competency of that branch are entitled to a presumption of validity. Trop v. Dulles, supra, 356 U.S. at 103; Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. 459 (1947); Weems v. United States, supra, 217 U.S. at 378-379; In re Kemmler, 136 U.S. 436, 449 (1890).

(2) Although recognizing that one member of the Court has branded retribution as having been roundly condemned as an intolerable aspiration for a government in a free society, [20] it is incumbent upon respondent to address the concept of retribution. It may also be noted that Mr. Justice Stewart in a concurring opinion, Furman v. Georgia, supra, 408 U.S. at 308, stated that:

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[20] 408 U.S. at 343.

> "I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."

And as Mr. Justice Powell noted in a dissenting opinion, Furman v. Georgia, supra, 408 U.S. at 452, the Court has long acknowledged the existence of retribution as an element in criminal sanctions and has never before been found impermissible. In Williams v. New York, 337 U.S. 241 (1949), the Court affirmed a death sentence imposed in a New York state court by a trial judge when one of the reasons given by the judge for the sentence was his revulsion at the "shocking details of the crime." Id., at 244.

Contrary to what the petitioner would have us accept, there is a widespread view that justice requires that no man should be allowed to gain by his misdeeds; that an individual who commits a crime should "pay his debt to society," regardless of whether he is reformed by having to do so and regardless of the deterrent effects

such payment may have on others. Such a view has deep roots in history. 21/ This concept, so deeply rooted in our past, has to a degree come to us in the present and thus should be understood. Mr. Justice Marshall in his concurring opinion in Furman v. Georgia, supra, 408 U.S. at 343, noted that, "Punishment as retribution has been condemned by scholars for centuries". However, Immanuel Kant, the 19th Century philosopher should not be completely ignored. Kant has stated:

> "Judicial punishment can never be used as a means to promote some other good for the criminal himself or for civil society, but instead it must

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21/ See, Leiser, LIBERTY, JUSTICE AND MORALS, supra, at 200, citing Numbers 32: 33, where God commands the children of Israel by saying, "You must not defile the land in which you reside, but blood defiles the earth; and there is no way to cleanse the earth of the blood that has been spilled upon it but by the blood of him who has spilled it."

> in all cases be imposed on him only on the ground that he has committed a crime;" 22/

While Kant's view may represent the other extreme, certainly it may not be said that retribution is no longer a legitimate reason for punishment and thus constitutionally impermissible. 23/

22/ Murphy, Jeffrie G., KANT, THE PHILOSOPHY OF RIGHT (London, MacMillan and Co. Ltd., 1970), p. 140.

23/ As to current attitudes on retribution one need only look at the March, 1976, issue of TRIAL magazine, published by The Association of Trial Lawyers of America. Stephen A. Bennett in an article "Rehabilitation in Check", states:

"The debate over the merits of prisons and punishments has reached a new high pitch, and the forces in favor of retribution appear to be winning. Within the last five years, the idea that prisons are meant primarily to rehabilitate has been subjected, to lethal bombardments. Today the 'rehabilitation ideal' lies sprawled on its deathbed.

(Fn. continued on next page)

It is submitted that retribution is a vital part of mankind's concept of justice. It is difficult for people

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(fn. continued)

"This new thrust has emerged with sudden swiftness. Little more than five years ago you could hear prison administrators everywhere enthusiastically talk of rehabilitation as their chief goal. Listening to them talk, one would have regarded today's thinking as heretical, not to mention barbaric. Retribution in place of rehabilitation? To some, even the word sounds cruel and unusual. In truth, however, retribution always has been a real, if not always acknowledged, function of prisons. A growing number of authorities and decision-makers are calling for the recognition of that fact. And they make no apologies."

to understand that in our "system of criminal justice" the victim should be compelled to suffer more than the attacker. [24]

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[24] Leiser, LIBERTY, JUSTICE AND MORALS, supra, at 202 quotes from Edmond N. Cahn, THE SENSE OF INJUSTICE: AN ANTHROPOMORPHIC VIEW OF LAW (New York: New York University Press, 1949), p. 12, as follows:

"The evolutionary connectedness of human life and of man's relations is the root fact of law . . . Justice, as many attempted definitions have rather clearly demonstrated, is unwilling to be captured in a formula. Nevertheless, it somehow remains a word of magic evocations. . . . Perhaps the human mind does contain self-evident truths concerning justice, from which legal norms less obvious in their nature may be deduced."

In Furman v. Georgia, supra, 408 U.S. at 414, Mr. Justice Blackmun in a dissenting opinion stated:

> "Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked. Let us hope that, with the Court's decision, the terror imposed will be forgotten by those upon whom it was visited, and that our society will reap the hoped-for benefits of magnanimity."

From the response of the state legislators echoing the will of the people, it is obvious that the terror has not been forgotten. 25/

How does the petitioner confront the concept of retribution? By the bold and singular assertion that, "With these constitutional limitations, it cannot

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25/ As has been previously pointed out in this brief, 35 states have responded to the Court's decision in Furman v. Georgia, supra, by enacting new statutes providing for capital punishment.

be asserted that any particular penalty is more supportable by a retributive purpose than any other penalty." 26/ The people of Georgia do not agree. 27/

26/ Brief of Petitioner in Fowler v. N. C., p. 127, incorporated by reference of petitioner.

27/ Ga. Laws 1973, p. 159.

C. The Georgia Jury's Imposition of the Death Penalty is in a Non-Arbitrary and Non-Capricious Manner.

As the Court is no doubt aware many have read the concurring opinions in Furman v. Georgia, supra, as an attack upon the American jury system, certainly in capital cases at least. The jury's exercise of its discretion was branded as arbitrary and capricious. 28/ The informed selectivity employed by the jury was discounted. 29/ These views and allegations were startling, particularly so in light of the Court's recent decision in McGautha v. California, 402 U.S. 183 (1971). In McGautha v. California, supra, 402 U.S. at 202, the Court relied heavily upon Witherspoon v. Illinois, 391 U.S. 510 (1968), and quoted from that decision as follows:

> "[Juries] do little more - and must do nothing less - than express the conscience of the community on the ultimate question of life or death."

28/ 408 U.S. at 295, 310, 314.

29/ 408 U.S. at 293, 294.

The Court quoted further:

> "One of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system - a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"

Of course, McGautha went on to hold that the absence of standards to guide a jury's discretion in determining whether to impose or withhold the death penalty did not violate the due process clause of the Fourteenth Amendment.

Traditionally, as Mr. Chief Justice Burger noted in his dissenting opinion in Furman v. Georgia, supra, 30/ the selectivity of juries in imposing capital punishment has been viewed as a refinement on, rather than a repudiation of, the statutory authorization for the death penalty. The Chief Justice also notes that there are many factors which a jury quite properly should consider before imposing a sentence of death. Such factors should include among others the motive or lack of motive of the perpetrator, the degree of injury or suffering of the victim or victims and the degree of brutality involved in the crime. The determination

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30/ 408 U.S. at 388

of such factors appears to be one for which the jury is uniquely suited. McGautha v. California, supra, 402 U.S. at 205, quoting the Royal Commission on Capital Punishment, 1949-1953, Cnd. 8932, § 553(b), stated:

> "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder. Discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished."

And again quoting McGautha v. California, supra, 402 U.S. at 208:

> "For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of cricumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need."

As Mr. Chief Justice Burger has noted, 31 / it is remarkable that with this Nation's basic trust in lay jurors as the keystone in our system of criminal justice that the most

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31 / 408 U.S. at 402.

sensitive and important of all decisions should be taken away from them. And as aptly stated by the Court in Reid v. Covert, 354 U.S. 1, 10 (1957):

> "Trial by jury in a court of law and in accordance with traditional modes of procedure . . . has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or conveniences."

Alexis de Tocqueville writing in Democracy in America, p. 282, stated:

> "The institution of the jury . . . places the real direction of society in the hands of the governed . . . and not in that of the government. . . . He who punishes the criminal is . . . the real master of society. . . ."

The few specific allegations of arbitrariness made by petitioner in this case concerning Georgia juries have been refuted in Part I of this brief and will not be gone into further here.

Petitioner has alleged in his brief by incorporation of other briefs, 32 /

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32 / Brief of Petitioner in Fowler v. N. C., pp. 130, 131, incorporated by reference of petitioner

the contention that the public has repudiated capital punishment and attempts to support the contention by arguing that because all of those who are convicted of crimes for which the law authorizes a capital sentence as the maximum sentence do not receive that maximum.

Petitioner urges that if capital punishment were uniformly applied to all persons liable to it, it would be unacceptable to "the people." Such an argument would undoubtedly render all maximum penalties unconstitutional, because while it is true that contemporary society would probably not accept the imposition of current maximum penalties for every offender for murder or rape, the same is true for any other crime (such as 20 years for every burglary and every burglar, 10 years for every aggravated assault, 10 years for every first degree forgery and every such forger).

The argument is nothing more than a demand that we revert to a system of mandatory penalties fixed for narrowly-categorized crimes so that regardless of mitigating circumstances or the personal history of the defendant, the death penalty (or any other penalty for that matter) would be automatic once guilt was determined. It is difficult to see how such a wooden approach would be constitutionally mandated, particularly when the discretion of the jury has been regarded as the intervention of the voice

of society against which the crime was committed. The jurors do not represent the community in the sense that they are elected to convey the community's collective sentiments and to be its spokesmen. The jurors instead represent the community in the sense that they come from it and therefore sit as a parcel of it, though partitioned from it. The jury is not the State. It is a body selected cooperatively by the State and the defendant. And in Georgia the defendant has twice the voice of the State as to its composition. 33/

What the fatal degree of infrequency is the petitioner does not inform us. Nor does he inform us of the specific infrequency of imposition of the death penalty by Georgia juries. Yet he postulates that such unknown infrequency subjects an enactment of the General Assembly of Georgia to a finding of unconstitutinality. Certainly such blatent self-serving generalities will will not suffice in a constitutional court.

33/ Under Ga. Law for the trial of any case which could result in a punishment of death or imprisonment for not less than four years, the defendant has 20 peremptory challenges, the State 10. Ga. Code Ann. § 59-805.

Petitioner makes the mistake of looking only at the convicted criminal, with respect to punishment, and not to society as a whole and to the victim and to future victims:

> But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." Cardozo, J., Snyder v. Mass., 291 U.S. 97, 122 (1934).

The picture is askance if it is viewed only from the point of view of the condemned criminal. The Court must look at the penalty from the point of view also of society, of the victims in these cases and future victims of violent crimes, of the capabilities of current law enforcement as well as the capabilities of current penal systems.

The death penalty is a means of self-defense for the members of society. Capital crimes violate the imperative of social preservation. The contest is not between the State and the individual; it is wholly between competing rights of the individual - the right to be protected from criminal attack and the several rights in the amendments. A basic, if not the first right of the individual, is to be protected from attack. That is why we have government.

Retention of the death penalty insures a greater fear in the potential criminal and thereby contributes to a more civilized society wherein citizens may live and move with a diminished apprehension of criminal attack. Forbidding the imposition of the penalty can do no more than foster social permissiveness among law-breakers at the cost of social permissiveness among law-abiding citizens.

CONCLUSION

It has not been demonstrated that the death penalty as provided for under Georgia law is excessive or disproportionate to a constitutional degree, barbaric, contrary to commonly-held notions of human decency, unnecessarily or inherently cruel. Petitioner has not met the burden of proving that the legislatively-provided penalties are contrary to the constitutional principles invoked.

The Constitution does not demand the abolition of forfeiture of life as a penalty for crime and as a weapon against crime by way of its existence as a threat; the Constitution does not demand that the balance of fear weigh more heavily on the citizen than on the potential capital criminal.

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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This _____ day of March, 1976.

_____
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APPENDIX A

1. Statutory Procedures

The 1973 Georgia statute to be tested in light of the Eighth and Fourteenth Amendments is Ga. Laws 1973, p. 159, which provides "procedures and requirements for the authorization of (the death penalty)." The trial in this case was conducted pursuant to this statute, and it preceded enactment of Ga. Laws 1974, p. 352, which, in converting Georgia from jury sentencing to judge sentencing (in non-capital cases only), also amended sections of laws concerned with death penalty procedures. The change of language brought about by the 1974 amendments did not significantly affect death penalty procedures.

Portions of these two laws directly amend the Code of Georgia (1933), and others amend or enact statutory law not made a part of the Code. Most of the provisions of the two laws have been codified unofficially in "Ga. Code Ann." When this is the case, that reference is indicated in the marginal captions to the provisions quoted below:

Ga. Code Ann. § 26-3102 (Supp. 1975).

"26-3102. Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty." (Ga. Laws 1973, p. 159, 170).

Ga. Code Ann. § 27-2302 (Supp. 1975).

"27-2302. Recommendation to mercy. - In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall mean imprisonment for life.

"When the verdict is guilty without a recommendation to mercy it shall be legal and shall mean that the convicted person shall be sentenced to death. However, when it is shown that a person convicted of a capital offense without a recommendation to mercy had not reached his seventeenth birthday at the time of the commission of the offense the punishment of such person shall not be death but shall be imprisonment for life." Ga. Laws 1963, p. 122, 123.

[As amended by Ga. Laws 1974, p. 352, 353, this now reads:

["27-2302. Recommendation to mercy. - In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge."]

Ga. Code Ann. § 27-2401 (1975 Supp.)

"27-2401. Stenographic notes; entry of testimony of minutes of court; transcript or brief. - On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record, or take stenographic notes of, the testimony and proceedings in the case, except the argument of counsel. In the event of a verdict of guilty, the testimony shall be entered on the minutes of the court or in a book to be kept for that purpose. In the event that a sentence of death is imposed, the transcript of the case shall be prepared at the earliest possible time and shall take priority in preparation over all other cases. . . ." (Ga. Laws 1973, pp. 159, 169).

Ga. Code Ann. § 27-2503.

"27-2503. Presentence hearings in felony cases. - (a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation,

and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas; Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in Code section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

"(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings

conducted before the judge as provided in subsection (a) of this Section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law." (Ga. Laws 1974, pp. 352, 358. [Replacing former Ga. Code Ann. § 27-2534, as of July 1, 1974.]

Ga. Code Ann. § 27-2528.

"Section 1. Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking." (Ga. Laws 1973, pp. 159, 171).

Ga. Code Ann. § 27-2534.

"Section 1A. At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate

instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code Section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment." (Ga. Laws 1973, pp. 159, 162, superseded by Ga. Laws 1974, pp. 352, 358.) [Ga. Code § 27-2503].

Ga. Code Ann. § 27-2534.1:

"27-2534.1 Mitigating and aggravating circumstances; death penalty. - (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any

mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code section 27-2534.1(b) is so found, the death penalty shall not be imposed." (Ga. Laws 1973, p. 159, 164).

Ga. Code Ann. § 27-2537.

"27-2537. Review of death sentences. (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and

the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

"(c) With regard to the sentence, the court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"(1) Affirm the sentence of death; or

"(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

"(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence." (Ga. Laws 1973, pp. 159, 164).

Ga. Code Ann. § 70-301 (1975 Supp.):

"Section 16. All applications for new trial, except in extraordinary cases shall be made within thirty (30) days of the entry of the judgment on the verdict, or entry of the judgment where the case was tried without a jury. The motion may be amended any time on or before the ruling thereon, and where the grounds thereof require consideration of the transcript of evidence or proceedings, the court may in its discretion grant an extension

of time, except in cases where the death penalty is imposed, for the preparation and filing of the transcript, which may be done any time on or before the hearing, or the court may in its discretion hear and determine the motion before the transcript of evidence and proceedings is prepared and filed. The grounds of the motion need not be approved by the court. The motion may be heard in vacation or term time, but where not heard at the time named in the order, whether in term time or vacation, it shall stand for hearing at the next term or at such other time in term or vacation as the court by order at any time may prescribe, unless sooner disposed of. Motions for new trial in cases in which the death penalty is imposed shall be given priority. On appeal, a party shall not be limited to the grounds urged in the motion, or any amendment thereof. The court also shall be empowered to grant a new trial on its own motion within thirty (30) days from entry of the judgment, except in criminal cases where the defendant was acquitted." (Ga. Laws 1973, pp. 159, 168).

Severability Clause in 1973 Act:

"Section 10. In the event any section, subsection, sentence, clause or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of

this Act, which shall remain of full force and effect, as if the section, subsection, sentence, clause or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional." (Ga. Laws 1973, pp. 159, 172).

Effective Date, 1973 Act:

"Section 11. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval. The Supreme Court may suspend consideration of death penalty cases until January 1, 1974, or such earlier times as the court determines it is prepared to make the comparisons required under the provisions of this Act." (Ga. Laws 1973, pp. 159, 172).

Repealer, 1973 Act:

"Section 12. All laws and parts of laws in conflict with this Act are hereby repealed. Approved March 28, 1973." (Ga. Laws 1973, pp. 159, 172).

2. Capital Crimes

a. Current capital crimes:

The procedures set out above are for application in six offenses:

Ga. Code Ann. § 26-1101 (1972 Rev.)

"26-1101. Murder.—(a) A person commits murder when he unlawfully and with malice aforethought either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be punished by death or by imprisonment for life." (Ga. Laws 1968, pp. 1249, 1276).

Ga. Code Ann. § 26-1311.

"26-1311. Kidnapping. -

(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

"(b) A person over the age of 17 commits kidnapping when he forcibly, maliciously, or fraudulently leads, takes, or carries away, or decoys or entices away, any child under the age of 16 years against the will of the child's parents or other person having lawful custody.

"A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years; Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death." (Ga. Laws 1968, pp. 1249, 1282).

Ga. Code Ann. § 26-1902:

"26-1902. Armed robbery. - A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years." (Ga. Laws 1968, pp. 1249, 1298; as amended Ga. Laws 1969, p. 810).

Ga. Code Ann. § 26-2001:

"26-2001. Rape. - A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female." (Ga. Laws 1968, pp. 1249, 1299.)

Ga. Code Ann. § 26-2201:

"26-2201. Treason. - A person owing allegiance to the State commits treason when he knowingly levies war against the State, adheres to

her enemies, or gives them aid and comfort. No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on confession in open court. When the overt act of treason is committed outside this State, the person charged therewith may be tried in any county in this State. A person convicted of treason shall be punished by death, or by imprisonment for life or for not less than 15 years." (Ga. Laws 1968, pp. 1249, 1303).

Ga. Code Ann. § 26-3301:

"26-3301. [hijacking] - Definition: punishment; continuing offense; jurisdiction. - A person commits hijacking of an aircraft when he (1) by use of force; or (2) by intimidation, by the use of threats or coercion, places the pilot of an aircraft in fear of immediate serious bodily injury to himself or to another, causes the diverting of an aircraft from its intended destination to a destination dictated by such person. A person convicted of hijacking an aircraft shall be punished by death or life imprisonment. The offense of hijacking is declared to be a continuing offense from the point of beginning and jurisdiction to try a person accused of the offense of hijacking shall be in any county of Georgia over which the aircraft is being operated." (Ga. Laws 1969, pp. 741, 742.) [see also Ga. Code Ann. § 2-202 (1973 Rev.)]

b. Perjury -

[Otherwise concerned with procedure, the 1973 statute removed perjury from the group of capital offenses. Ga. Laws 1973, p. 159, 163 (Ga. Code § 26-2401 [Supp. 1975])].

3. Prosecutorial and Grand Jury Discretion.

The responsibilities and perrogatives of the district attorney and the grand jury in prosecuting for capital crimes are shaped, in part, by the following:

Constitution of Georgia of 1945, Ga. Code Ann. § 2-3107:

"Information from officers and employees; suspension of officers. - The Governor may require information in writing from Constitutional officers, department heads, and all State employees, on any subject relating to the duties of their respective officers or employment. The General Assembly shall have authority to provide by law for the suspension of any Constitutional officer or department head from the discharge of the duties of his office, and also for the appointment of a suitable person to discharge the duties of the same." Ga. Const. Art. V, Sec. 1, Par. 17.

Constitution of Georgia of 1945, Ga. Code Ann. § 2-4602:

"2-4602 (6531) Paragraph II. Duties. - It shall be the duty of the district attorney to represent the State in all cases in the superior court of his circuit and in all cases taken up from the superior court of his circuit to the Supreme Court and Court of Appeals and to perform such other services as shall be required of him by law." Ga. Const., Art. VI, Sec. II, Par. 2.

Rules and Regulations for Organization and Government of State Bar of Georgia - Code of Professional Responsibility - Ethical Consideration - EC 7-13 (Ga. Code Ann. App. to Title 9) (1973 Rev.)

"Duty of Public Prosecutor. - The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit

of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused."

Id. - Code of Professional Responsibility - Disciplinary Rule - DR 7-103.

"Performing the Duty of Public Prosecutor or Other Government Lawyer. - (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause."

Ga. Code § 24-2908 (1933):

"24-2908. Duties. - The duties of the district attorneys within their respective circuits are-

"1. To attend each session of the superior courts, regular or adjourned, unless excused by the judge thereof, and remain until the business of the State is disposed of.

"2. To attend on the grand juries, advise them in relation to matters of law, and swear and examine witnesses before them.

"3. To administer the oaths the laws require, to the grand and petit jurors, to the bailiffs or other officers of the court, and otherwise to aid the presiding judge in organizing the courts as he may require.

"4. To draw up all indictments or presentments, when requested by the grand jury, and to prosecute all indictable offenses.

"5. To prosecute or defend any civil action in the prosecution or defense of which the State is interested, unless otherwise specially provided for.

Ga. Code § 24-2915 (1933):

"24-2915. Entry of nolle prosequi to indictments. - The district attorney has authority, on the terms prescribed by law, to enter a nolle prosequi on indictments."

Ga. Code Ann. § 27-704 (1972 Rev.):

"27-704. Trial on accusation; waiver of indictment. - In all felony cases, other than capital felonies, in which the defendants have been bound over to the superior court, or are confined in jail pending commitment trial, or are in jail, having waived

commitment trial, the prosecuting officers of such court shall have authority to prefer accusations, and such parties shall be tried on such accusations: Provided, that parties going to trial under such accusations shall in writing waive indictment by a grand jury. Judges of the superior court may open their courts at any time without the presence of either grand jury or traverse jury to receive and act upon pleas of guilty in misdemeanor cases, and in felony cases except those punishable by death or life imprisonment, when the judge and the accused consent thereto. The judge may try the issues in such cases without a jury upon an accusation filed by the prosecuting officer where the accused has waived indictment and consented thereto in writing and counsel is present in court representing such defendant either by virtue of his employment or by appointment by the court. In all misdemeanor cases which may be prosecuted in superior court, the district attorney shall have authority, with or without the consent of the defendant, to prefer accusations, indictment by a grand jury not being required in misdemeanor cases." (Ga. Laws 1972, pp. 386, 623.)

Ga. Code § 27-1801 (1933):

"27-1801. [Nolle Prosequi] When and how allowed. - After an examination of the case in open court, and before it has been submitted

to the jury, the district attorney may enter a nolle prosequi with the consent of the court. After the case has been submitted to the jury, a nolle prosequi shall not be entered except by the consent of the defendant."

Ga. Code § 59-304 (1933):

"59-304. When bound to notice offenses. - Grand jurors are bound only to notice or make presentments of such offenses as may or shall come to their knowledge or observation after they shall have been sworn; nevertheless they have the right and power, and it is their duty as jurors to make presentments of any violations of the laws which they may know to have been committed at any previous time, which are not barred by the statute of limitations."

4. Oaths.

The prosecutor, the grand jury, the jury, and the trial judge all take the following oaths (the jury taking two):

Ga. Code § 24-2605 (1933):

"24-2605. Oath of judges. - Before entering on the duties of their office, they must take the oath required of all civil officers, and in addition the following, viz: 'I swear that I will administer justice without

respect to person, and do equal rights to the poor and the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as judge of the superior courts of this State, according to the best of my ability and understanding, and agreeably to the laws and Constitution of this State and the Constitution of the United States. So help me God.'"

Ga. Code § 24-2902 (1933):

"24-2902: Election, term of office, and oath. - There shall be a district attorney for each judicial circuit, whose official term, except when commissioned to fill an unexpired term, shall be four years. He shall be elected by the people, in the manner provided by this Code, and take the following oath, viz: 'I do swear that I will faithfully and impartially, and without fear, favor, or affection, discharge my duties as solicitor general, and will take only my lawful fees of office. So help me God.'"

Ga. Code § 59-208 (1933):

"59-208. Appointment of foreman. Oath of the grand jury. - The judge of the superior court may appoint the foreman of the grand jury or may direct the grand jury to elect its own foreman. The following oath shall be administered to the foreman and each member of all grand

juries, viz.: 'You as foreman of the grand jury for the county of ....., shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge, or shall come to your knowledge, touching the present service; the State's counsel, your fellows', and your own, you shall keep secret, unless called upon to give evidence thereof in some court of law in this State; you shall present no one from envy, hatred, or malice, nor shall you leave any one unpresented from fear, favor, affection, reward, or the hope thereof, but you shall present all things truly, and as they come to your knowledge. So help you God.'"

Ga. Code § 59-706 (1933):

"59-706. Oath of panels of jury. - Each panel of the petit jury shall take the following oath: 'You shall well and truly try each cause submitted to you during the present term, and a true verdict give, according to the law as given you in charge, and the opinion you entertain of the evidence produced to you, to the best of your skill and knowledge, without favor or affection to either party, provided you are not discharged from the consideration of the case submitted. So help you God.'"

Ga. Code § 59-709 (1933):

"59-709. Oath in criminal cases. - In all criminal cases, the following oath shall be administered to the petit jury, to-wit: 'You shall well and truly try the issue formed upon this bill of indictment between the State of Georgia and A.B., who is charged (here state the crime or offense), and a true verdict give according to evidence. So help you God.'"

Ga. Code Ann. § 59-908 (Supp. 1975).

"59-908. Same; oath; disposition and seating; confinement; expense allowance. - Such alternate jurors shall take the same oath as the jurors already selected . . . ." Ga. Laws 1968, pp. 1225, 1226; Ga. Laws 1974, pp. 325, 328).

5. Execution.

Procedures for implementing the death penalty include the following:

Ga. Code Ann. § 27-2512 (1972 Rev.)

"27-2512. Electrocution substituted for hanging; place of execution. - All persons who shall be convicted of a capital crime and who shall have imposed upon them the sentence of death, shall suffer such punishment by electrocution instead of by hanging.

"In all cases in which the defendant is sentenced to be electrocuted it shall be the duty of the trial judge, in passing sentence, to direct that the defendant be delivered to the Director of Corrections for electrocution at such penal institution as may be designated by said Director. However, no executions shall be held at the old prison farm in Baldwin county." (Ga. Laws 1924, pp. 195, 197; Ga. Laws 1937-38, Extra. Sess., p. 330).

Ga. Code Ann. § 27-2513 (1972 Rev.):

"27-2513. Death chamber and apparatus. - The Board of Corrections shall provide a death chamber and all necessary apparatus, machinery and appliances for inflicting such penalty by electrocution." (Ga. Laws 1956, pp. 161, 180).

Ga. Code § 27-2514 (1933):

"27-2514. Sentence of death; copy for penitentiary superintendent;time and mode of conveying prisoner to penitentiary; expenses. - Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death according to the provisions of this law, and to make such sentence in writing, which shall be filed with the papers in the case against such convicted

person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same, and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of commissioners of roads and revenues, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

Ga. Code Ann. § 27-2515 (1972 Rev.).

"27-2515. Execution by warden and assistants; witnesses. - There shall be present at such execution the warden of the penitentiary, or a deputy warden thereof, who shall serve as executioner, at least two assistants, two physicians to determine when death supervenes, an electrician, a suitable guard, and, if the condemned person so desires, his counsel, relatives and such clergyman and friends as he may desire." (Ga. Laws 1956, pp. 161, 182).

Ga. Code § 27-2516 (1933):

"27-2516. Certificate of execution. - The executioner and attending physician shall certify the fact of such execution to the clerk of the superior court of the county in which said sentence was pronounced, which certificate shall be filed by the clerk with the papers in the case."

Ga. Code § 27-2518. (1933):

"27-2518. Change of date for execution; limit for new date; record of order. - Where the date for the execution of any such convict in a capital case has passed by reason of a supersedeas incident to the suing out of a bill of exceptions to the judgment of the trial court, or a respite by the Governor, or for any other reason, the judge of the superior court of the county

where the case was tried shall have power and authority without requiring the convict to be brought before him by habeas corpus, as provided in section 27-2521, to pass an order in term time or vacation fixing a new date for the execution of the original sentence, said order to be recorded on the minutes of said court as other official orders and sentences are required by law to be done and a certified copy of said order shall be sent immediately to the superintendent of the State penitentiary at the place of execution. The judge shall fix the new date not less than 10 nor more than 20 days from the date of such order."

Ga. Code § 27-2521 (1933):

"27-2521. Writ of habeas corpus or warrant to issue if execution not done. - Whenever, for any reason, any convict sentenced to the punishment of death shall not have been executed pursuant to such sentence, and the same shall stand in full force, the presiding judge of the superior court where the conviction was had, on the application of the solicitor general of the circuit, or other person prosecuting for the State, shall issue a habeas corpus to bring such convict before him; or if such convict be at large, said judge or any judicial officer may issue a warrant for his apprehension; and upon the convict being brought before the judge, either by habeas corpus or

under such warrant, he shall proceed to inquire into the facts and circumstances of the case; and if no legal reason exists against the execution of the sentence, he shall sign and issue a warrant to the warden of the penitentiary, commanding him to do execution of such sentence at such time and place as shall be appointed, which the warden shall do accordingly; and the judge shall cause the proceedings to be entered on the minutes of the superior court of the county."

Ga. Code § 27-2602 (1933):

"27-2602. Disposition of insane convicts. Cost of investigations. - Upon satisfactory evidence being offered to the Governor, showing reasonable grounds to believe that a person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, in his discretion, have said person examined by such expert physicians as the Governor may choose, the cost of said examination to be paid by the Governor out of the contingent fund. It shall be the responsibility of the Governor to cause said physicians to receive written instructions which plainly set forth the legal definitions of insanity as recognized by the laws of this State, and said physician shall, after making the necessary examination of the prisoner, report in writing to the Governor whether

or not reasonable grounds exist to raise an issue that the prisoner is insane by the standards previously specified to them by the Governor. The Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored or determined by laws now in force."

Ga. Code § 27-2603 (1933):

"27-2603. Insane convict committed to the Milledgeville State Hospital. - When any person shall, after conviction of a capital crime, become insane, and shall be so declared in accordance with the provisions of the preceding section, the convict shall be received into the Milledgeville State Hospital, there to be safely kept and treated as other adjudged insane persons. All the provisions of the law relating to insane persons under sentence of imprisonment in the penitentiary shall apply to the class of cases herein provided for, so far as applicable."

Ga. Code § 27-2604 (1933):

"27-2604. Resentence and warrant on recovery of convict. - If the convict mentioned in the preceding section should recover, the fact shall be at once certified by the superintendent of the Milledgeville

State Hospital to the judge of the court in which the conviction occurred. Whenever it shall appear to the judge by said certificate, or by inquisition or otherwise, that the convict has recovered and is of sound mind, he shall have the convict removed to the jail of the county in which the conviction occurred, or to some other safe jail, and shall pass sentence, either in term time or vacation, upon the convict, and he shall issue a new warrant directing the sheriff to do execution of the sentence at such time and place as may be named in the warrant, which the sheriff shall be bound to do accordingly. The judge shall cause the new warrant, and other proceedings in the case, to be entered on the minutes of said superior court."

6. Clemency.

Clemency is authorized as follows:

Constitution of Georgia of 1945; Ga. Code Ann. § 2-3011 (1973 Rev.):

"2-3011. Paragraph XI. Reprieves and pardons; State Board of Pardons and Paroles. - The Governor shall have power to suspend the execution of a sentence of death, after conviction, for offenses against the State, until the State Board of Pardons and Paroles, hereinafter provided, shall have an opportunity of hearing the application of the convicted person for any relief within the power of such board, or for any other purpose which may be deemed necessary by the Governor.

Upon conviction for treason the Governor may only suspend the execution of the sentence and report the case to the General Assembly at the next meeting thereof, when the General Assembly shall either pardon, commute the sentence, direct its execution or grant a further reprieve. The Governor shall, at each session of the General Assembly, communicate to that body each case of suspension of sentence, stating the name of the convict, the offense for which he was convicted, the sentence and its date, the date of the reprieve or suspension, and the reasons for granting the same. He shall take care that the laws are faithfully executed, and shall be a conservator of the peace throughout the State. There shall be a State Board of Pardons and Paroles to be composed of not less than five or more than seven members, the number to be determined by the General Assembly.... The State Board of Pardons and Paroles shall have power to grant reprieves, pardons and paroles, to commute penalties, remove disabilities imposed by law, and may remit any part of a sentence for any offense against the State, after conviction except in cases oftreason or impeachment, and except in cases in which the Governor refuses to suspend a sentence of death: Provided that such board shall act on all applications within 90 days from the filing of same, and in all cases a majority shall decide the action

of the board. If any member for any cause is unable to serve in any case involving capital punishment when the board shall consist of three members, the Governor shall act as the third member of said board and the action so taken in such instance shall be by unanimous vote. The State Board of Pardons and Paroles shall at each session of the General Assembly communicate to that body in full detail each case of pardon, parole, commutation, removal of the convict, the offense for which he was convicted, the sentence and its date, the date of the pardon, parole, commutation, removal of the convict the offense for which he was convicted, the sentence and its date, the date of the pardon, parole,commutation, removal of disabilities or remission of sentence and the reasons for granting the same, and the State Board of Pardons and Paroles may make rules and regulations as may be authorized by law.

"Each year the board shall elect one of its members to serve as chairman of the board for the ensuing year. The General Assembly may enact laws in aid of, but not inconsistent with, this paragraph." (Ga. Const., Art. V, Sec. I, Par. 11.)

Ga. Code Ann. § 77-502.3 (1973 Rev.)

"77-502.3 Same; cases involving capital punishment. - In the event any member of the State Board of Pardons and Paroles is disqualified or unable to serve in any case involving capital punishment and the Governor is also disqualified or for any cause is unable to act as the third member of the State Board of Pardons and Paroles, the Governor or the person exercising the executive power shall, by executive order, appoint a person to serve in the place and stead of the Governor.

"Notwithstanding any other law to the contrary, such appointee may be an elected official, appointed official or an employee of the State of Georgia. The order appointing such person to serve in the place and stead of any such member and the Governor shall include the compensation to be received by such person." (Ga. Laws 1970, pp. 729, 733).

Ga. Code Ann. § 77-511 (1973 Rev.)

"77-511. Power of board to grant reprieves, pardons, and paroles. Duty to supervise parolees, aid parolees and probationers, and study cases of prisoners. - The State Board of Pardons and Paroles shall have power to grant reprieves, pardons

and paroles, to commute penalties, to remove disabilities imposed by law, and to remit any part of a sentence for offenses against the State, after conviction, except in cases of treason and impeachment, and except in cases in which the death sentence has been imposed and the Governor refuses to suspend the execution of such death sentence to enable the board to consider and pass upon the same. In all cases when the Governor has suspended the execution of a death sentence to enable the board to consider and pass on same it shall be mandatory that said board act within a period not exceeding 90 days from the date of the suspension order of the Governor. In all cases of clemency, pardons and paroles, a majority vote of the members is sufficient for approval except in cases involving capital punishment, and in such cases a unanimous vote of all members of the board is necessary: Provided, however, if any member for any cause is unable to serve in any case involving capital punishment the Governor shall act as the third member of said board and the action so taken in such instances shall be by unanimous vote. In the cases which the board has power to consider, such board shall be charged with the duty of determining what prisoners serving sentences imposed by a court of this State may be released on pardon or parole, and affixing the time and conditions thereof. The Board shall also be charged with the duty of supervising all persons placed on parole; of determining violations thereof and of taking action with reference thereto;

of making investigations as may be necessary and of aiding parolees or probationers in securing employment. It shall be the duty of the board personally to study the cases of those prisoners whom the board has power to consider, so as to determine their ultimate fitness for such relief as the board has power to grant: Provided, however, that the board by an affirmative vote of two of its members shall have the power to commute a sentence of death to one of life imprisonment." (Ga. Laws 1943, pp. 185, 187; Ga. Laws 1973, pp. 1294, 1295.)

Ga. Code Ann. § 77-513 (1973 Rev.)

"77-513. Vote required to extend clemency; written opinions. - No person shall be treated clemency, pardon or parole or other relief from sentence except by a majority vote of the board and in all cases involving capital punishment, a unanimous vote of all members is necessary provided two members of said board may commute a death sentence to life imprisonment, as provided in section 77-511. However, each member of the board shall render a written decision on each case considered by the board and such written decision shall become a part of the permanent record." (Ga. Laws 1943, pp. 185, 189).

Ga. Code Ann. § 77-526 (1973 Rev.)

"77-526. Duty of board to make reports. On or before the first day of January each year the board shall make a written report of its activities, copies of which shall be sent to the Governor and to the Attorney General and to such other officers and persons as the board may deem advisable. One copy of said report shall become a part of the records of the board. Biennially the board shall make a full and complete report to the General Assembly of Georgia." (Ga. Laws 1943, pp. 185, 194).

Rules and Regulations of the State of Georgia - Board of Pardons and Paroles:

R. 475-2-.01(1):

"The Board shall have the power to grant reprieves, pardons and paroles, to commute penalties, remove disabilities imposed by law and may remit any part of sentence(s) for any offenses against the State, after conviction except in cases of treason or impeachment, and except in cases which the death penalty has been imposed and the Governor has refused to suspend execution to permit the Board to act upon the same. The Board is charged with the duty of determining which individuals may be granted relief and determining conditions and requirements for all persons placed on parole."

R. 475-3-.01 (2) (b) (c) (3)(a):

"(2) Commutation: (b) Application for commutation of a death sentence to life imprisonment may be in any written form and must contain grounds on which the request for commutation is based. Application will be considered by the Board.Where sufficient time for consideration does not remain, the Board will request the Governor to grant a stay of execution. A copy of the application for commutation will be furnished to the District Attorney of the county of conviction at least five days prior to the hearing date set by the Board; if practicable. The Board requests that application for commutation of a death sentence be submitted only when all legal remedies in State and Federal courts have been exhausted.

"(c) The Board will consider a commutation of a sentence imposed in other than death cases only when substantial evidence is submitted to the Board in writing that the sentence is either excessive, illegal, unconstitutional or void; that the ends of justice would be best served thereby, and that such action would be in the best interests of society and the inmate. Evidence submitted under this requirement must be direct evidence and affirmatively stated.

"(3) Pardons: (a) An order of pardon relieves an individual from the legal consequences of a particular crime or conviction Application for pardons may be in any written form. The Board will initiate an investigation for purposes of pardon where there is substantial evidence showing innocence or complete justification on the part of the inmate."

Report of The Trial Judge

of the

APPENDIX B

Superior Court of Gwinnett County, Georgia 1b

The State vs. Troy Leon Gregg
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

Name: Gregg (Last,) Troy (First) Leon (Middle) 2. Date of Birth 4 22 48 (Mo. Day Year)

Social Security Number 551 68 6135
Sex: M [x] F [ ]
3. Marital Status: Never Married [ ] Married [ ] Divorced [x] Spouse Deceased [ ]

Children
(a) Number of children 0
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)
Father living: yes [ ] no [x] If deceased, give date of death ?
Mother living: yes [ ] no [x] If deceased, give date of death ?
Number of children born to parents ?
Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 (11) 12 13 14 15 16 17
(Circle one) [college]
Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [ ] ? NO TESTS GIVEN
(IQ above 100) High [ ]

Psychiatric Evaluation Performed? Yes [ ] No [x]
If performed is defendant:
a. Able to distinguish right from wrong? [ ] [ ]
b. Able to adhere to the right? [ ] [ ]
c. Able to cooperate intelligently in his own defense [ ] [ ]
If examined, were character or behavior disorders found? Yes [ ] No [ ]
(If answer is yes please elaborate)

What other pertinent psychiatric [and psychological] information was revealed

None

Prior Work Record of Defendant:

Type Job	Pay	Dates Held	Reason for Termination
a. Truck Driver	?	?	?
b.			
c.			
d.			
e.			

*A separate report must be submitted for each defendant sentenced to death.

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1. Was the case tried with or without jury? With [ ] Without [ ]
2. How did the defendant plead? Guilty [ ] Not guilty [x]

C. Offense Related Data

1. Capital Offense for Which Penalty Imposed:
   a. Treason.....[ ]
   b. Murder.....[x]
   c. Kidnapping for Ransom.....[ ]
   d. Kidnapping where Injury Results.....[ ]
   e. Aircraft Hijacking.....[ ]
   f. Rape.....[ ]
   g. Armed Robbery.....[x]
2. Were other offenses tried in the same trial? yes [x] no [ ]

   If other offenses were tried in the same trial list those offenses.

   a. Armed Robbery (2 counts)
   b. Murder (2 counts)
   c. _____
   d. _____
3. If tried with jury, did the jury recommend the death sentence? Yes [x] No [ ]
4. Statutory aggravating circumstances found: Yes [x] No [ ]
5. Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or	[ ]	[ ]
(2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions,	[ ]	[ ]
b. (1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery or	[x]	[x]
(2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[ ]	[ ]
c. The offender by his act of murder, armed robbery, or kidnaping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]

d. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[x]	[x]
e. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[x]	[x]
h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i. The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

6. List non statutory aggravating circumstances indicated by the evidence, if any.
   a. None
   b. _____
   c. _____
   d. _____
7. Was there evidence of mitigating circumstances? Yes [ ] No [x]
8. If so, which of the following mitigating circumstances was in evidence?
   a. The defendant has no significant history of prior criminal activity. [ ]
   b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [ ]
   c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. [ ]
   d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct. [ ]
   e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. [ ]

f. The defendant acted under duress or under the domination of another person. [ ]

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [ ]

i. Other. [ ]
Please explain if (i) is checked _____

9. If tried with a jury, was the jury instructed to consider the circumstances indicated in 8 as mitigating circumstances? Yes [x] No [ ]

10. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [x]

11. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [x] No [ ]

12. Was the victim related by blood or marriage to defendant? Yes [ ] No [x]
13. If answer is yes, what was the relationship? _____

14. Was the victim an employer or employee of defendant? No [x]
Employer [ ]
Employee [ ]

15. Was the victim acquainted with the defendant? No [x]
Casual Acquaintance [ ]
Friend [ ]

16. Was the victim local resident or transient in the community? Resident [ ]
Transient [x]

17. Was the victim the same race as defendant? Yes [x] No [ ]

18. Was the victim the same sex as the defendant? Yes [x] No [ ]

19. Was the victim held hostage during the crime? No [x]
Yes - Less than an hour [ ]
Yes - More than an hour [ ]

20. Was the victim's reputation in the community: Good [ ]
Bad [ ]
Unknown [x]

21. Was the victim physically beaten or tortured? Yes [x] No [ ]
If yes, state extent of beating or torture: Both victims murdered.

2. What was the age of the victim? about 42

3. If a weapon was used in commission of the crime was it?
No weapon used [ ]
Poison [ ]
Motor Vehicle [ ]
Blunt Instrument [ ]
Sharp Instrument [ ]
Firearm [x]
Other _____ [ ]

4. Does the defendant have a record of prior convictions? Yes [ ] No [x]

5. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed:

Offense	Date of Offense	Sentence Imposed
a. None known		
b.		
c.		
d.		

6. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [x] was not

7. Was the defendant a local resident or transient in the community?
Resident [ ]
Transient [x]

D. Representation of Defendant * * See memorandum

1. Date trial counsel secured December 21, 1973

2. How was counsel secured? a. Retained by defendant [ ]
b. Appointed by Court [x]

3. If counsel was appointed by court was it because
a. Defendant unable to afford counsel? [x]
b. Defendant refused to secure counsel? [ ]
c. Other (explain) _____ [ ]

4. How many years has counsel practiced law? a. 0 to 5 [ ]
b. 5 to 10 [ ]
c. over 10 [x]

5. What is the nature of counsel's practice? a. Mostly civil [ ]
b. General [x]
c. Mostly criminal [ ]

6. Did the same counsel serve throughout the trial? Yes [ ] No [ ]

7. If not explain in detail. _____

8. (If more than one counsel answer the above questions as to each counsel and attach to this report.)

[NOTE BY RESPONDENT: The last 2 lines read: "If more than one counsel served, answer the above questions as to each counsel and attach to this report."]

E. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [x]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [x]

3. What percentage of the population of your county is the same race as the defendant?

   a. Under 10%.....[ ]
   b. 10 to 25%.....[ ]
   c. 25 to 50%.....[ ]
   d. 50 to 75%.....[ ]
   e. 75 to 90%.....[ ]
   f. Over 90%.....[x]

4. Were members of defendant's race represented on the jury? Yes [x] No [ ]

5. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [x]

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [x]

7. Was there extensive publicity in the community concerning this case? None in excess of A.B.A. approved standards Yes [ ] No [x]

8. Was the jury instructed to disregard such publicity? Yes [ ] No [x]

9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [x] No [ ]

10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [x]

11. If answer is yes, what was that evidence? _____

12. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case Case originally scheduled for January, (1974) term of Court; on motion of defense counsel case was continued until Feb. 1974 term.

F. Chronology of Case

		Elapsed Time
1.	Date of Offense November 21, 1973	
2.	Date of Arrest November 23, 1973	2
3.	Date Trial Began February 4, 1974	73
4.	Date Sentence Imposed February 8, 1974	4

Date post trial motions ruled on April 17, 1974

Date Trial Judge's Report Completed May 29, 1974

*Date Received by Supreme Court _____

*Date Sentence Review Completed _____

*Total Elapsed Days _____

* To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached ( )
2. He stated he had no comments ( )
3. He has not responded ( )
4. Copy submitted to Defense counsel (X)

May 29, 1974
Date

Judge, Superior Court of
Gwinnett Judicial Circle

Gwinnett County

Appeal of trial judge
June 74
C. Willard Hardy

RE: Initial appointment of counsel for Troy Leon Gregg

On November 27, 1973 Attorneys Jim Henderson and Stan Sunderland were appointed to represent defendant Troy Leon Gregg and the co-defendant Floyd Allen. They represented the defendant at the committment hearing held on November 27, 1973. Subsequently, when it appeared that there could possibly be a conflict, attorney Hughel Harrison was appointed (on December 21, 1973) to represent defendant Troy Leon Gregg.

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APPENDIX C

Statewide homicide total for 1974 = 873. 1/ Of that total, approximately 84 per cent were homicides where the victim was a spouse, relative, or well known acquaintance of the attacker, otherwise denoted as domestic homicides. 2/ There was a total of 392 arrests for homicides in Georgia in 1974. 3/

Homicides in the City of Atlanta for 1974 = 248. 4/ Of that total, approximately 80 per cent were homicides where the victim was a spouse, relative, or well known acquaintance of the attacker. 5/

1/ CRIME IN GEORGIA, prepared by State Crime Commission, Dec. 1974, at 46.

2/ Id. at 48.

3/ Id. at 169

4/ ATLANTA CRIMINAL JUSTICE COORDINATING COUNCIL, 1976 LOCAL CRIMINAL JUSTICE MASTER PLAN, at 36.

5. Id. at 55, 327